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A FREE SPEECH RIGHT TO IMPUGN JUDICIAL INTEGRITY IN COURT PROCEEDINGS

MARGARET TARKINGTON*

Abstract: This Article examines why a free speech right to impugn judicial integrity must be recognized for attorneys when acting as officers of the court and making statements in court proceedings. Such a right is necessary to protect the constitutional and legal rights of litigants to an unbiased and competent judiciary. Further, the recognition of such a right for the attorney preserves litigants' access to courts and due process rights. Previous scholarly arguments, which are based on analogies to other areas of limited First Amendment protection, fail to account for the protection of litigant rights, the role of attorneys in our adversary system, and the constitutionally required role of our judicial system. By curbing speech in the presentation of claims, the judiciary undermines the adversarial system and the role of attorneys therein, as well as undermining the judiciary's own role and responsibility in remedying constitutional violations and providing fair proceedings.

INTRODUCTION

As guardians of constitutional rights, the judiciary often addresses and demonstrates its commitment to such important constitutional values as due process, court access, and free speech. Indeed, as the U.S. Supreme Court reaffirmed in 2009 in *Caperton v. A.T. Massey Coal Co.*, “[i]t is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process,’” and such fairness includes a fair and impartial adjudicator.¹ Nevertheless, the judiciary does not always appreciate hav-

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¹ See 129 S. Ct. 2252, 2259 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

ing its own integrity questioned. Throughout the United States, state and federal courts discipline and sanction attorneys who make disparaging remarks about the judiciary and thereby impugn judicial integrity.² In so doing, courts have almost universally rejected the constitutional standard established by the U.S. Supreme Court in the seminal 1964 case *New York Times Co. v. Sullivan*³ for punishing speech regarding government officials.⁴ The punishment imposed for impugning judicial reputation has often been severe, with suspension from the practice of law not uncommon⁵ and, in at least one state, mandatory.⁶ Although courts have sanctioned attorneys regardless of the forum where the speech has occurred, many of the cases involve speech made by attorneys in court proceedings.⁷ The scholarly literature generally supports the denial of First Amendment protection in such cases, indicating that attorney speech—when made in court proceedings—is entitled to little, if any, constitutional protection.⁸ Indeed, in its 1991 plurality opinion,

² See, e.g., Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1569, 1571–72 (2009) (discussing cases).

³ 376 U.S. 254, 279–80 (1964) (protecting false, defamatory speech made about a public official regarding his official conduct, unless the speech was made with “actual malice,” defined as made with knowledge that it was false or with reckless disregard of whether it was false speech or not).

⁴ See Tarkington, *supra* note 2, at 1587–91. In *The Truth Be Damned*, I argue that *Sullivan* sets the general constitutional standard which must be employed to punish attorneys for speech impugning judicial integrity. As explained therein, such speech is core political speech entitled to the fullest constitutional protection. Moreover, attorneys are the very class of persons with the knowledge and exposure to have informed opinions about the judiciary. By denying their right to speak and the public’s corresponding right to receive such speech, the central purposes of the Free Speech Clause are defeated, including self-governance, robust debate on public issues, the unique sovereignty of the American people over government, and the ability of the public to employ democratic correctives to check and define the abuse of judicial power. This clogs the wheels of political change, allowing for judicial self-entrenchment and further abuse of judicial power. See generally *id.*

Although *The Truth Be Damned* examines the problem of punishing speech regarding the judiciary in general, it does not examine the distinct issues and competing interests associated with punishment of speech made in court filings and proceedings that are the subject of this Article.

⁵ See *id.* at 1569–70 & n.14 (reviewing cases).

⁶ See Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 433 (Ohio 2003) (*per curiam*) (“Unfounded attacks against the integrity of the judiciary require an actual suspension from the practice of law.”).

⁷ See Tarkington, *supra* note 2, at 1571–72 (explaining that “[a]ttorneys are punished for allegations in briefs and filings with courts, statements to the press, letters to the judiciary, communications with an authority to complain about a judge, pamphlets or campaign literature, comments posted on blogs, and even correspondence with friends, family, and clients,” and citing related cases).

⁸ See, e.g., Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161, 187–90 (2008) (arguing that speech in court proceedings and court filings lacks

Gentile v. State Bar of Nevada, a majority of the U.S. Supreme Court stated in dicta: "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."⁹ Although *Gentile* did not involve any in-court speech or speech filed in a court proceeding,¹⁰ courts and commentators have relied on *Gentile* for the proposition that attorneys have limited or no free speech rights in judicial proceedings, and have thereby rejected claims of First Amendment protection for attorney speech impugning judicial integrity that is contained in court filings.¹¹ Despite the relative consensus to the contrary, it is my contention that attorneys have a free speech right to impugn judicial integrity in court filings and proceedings.¹²

Notably, in a number of cases where attorneys have been sanctioned for their speech, the arguments the attorneys made, though perhaps inartful and sometimes exaggerated, were relevant to a claim, argument, or motion before the court. Attorneys have been sanctioned in both criminal and civil cases for impugning judicial integrity for statements made in motions seeking recusal or disqualification of a judge,¹³ claims filed against judges,¹⁴ arguments that a litigant or crimi-

constitutional protection); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 580, 584–87 (1998) (noting that attorney speech made in an official or public capacity receives lesser constitutional protection and analogizing attorney speech to other speech that enjoys limited constitutional protection); W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 372–73 (2001) (analogizing attorney speech to other areas of speech analysis with limited constitutional protection).

⁹ 501 U.S. 1030, 1071 (1991) (citations omitted).

¹⁰ *See id.* at 1044–45. *Gentile* involved pretrial statements to the press outlining the defendant's theory of the case and impeaching the credibility of a government witness. *See id.* It did not involve statements that impugned judicial integrity inside or outside of court proceedings. It also did not involve any speech that was verbally made to a court or included in court filings. Thus, the Court's statement about speech in court proceedings is quintessential dicta. *See id.*

¹¹ *See, e.g., In re Shearin*, 765 A.2d 930, 938 (Del. 2000); *In re Cobb*, 838 N.E.2d 1197, 1211 (Mass. 2005); *Gardner*, 793 N.E.2d at 433; Day, *supra* note 8, at 180.

¹² The cases examined herein pertain to statements made in court filings, but the arguments regarding the necessity of attorneys raising colorable claims of their clients would apply equally to in-court speech. There are, however, special concerns with protecting order in the courtroom beyond those involving statements in court filings. Nevertheless, as I argue below, courts need not specially punish even verbal in-court speech for impugning judicial integrity outside of *Sullivan's* subjective standard. To the extent the speech is irrelevant to the matter being heard, disrupts the tribunal, or influences a witness or jury, courts have other rules that prohibit such conduct and can enforce them as they would in other contexts. *See infra* notes 355–367 and accompanying text.

¹³ *See, e.g., Stilley v. Supreme Court Comm. on Prof'l Conduct*, 259 S.W.3d 395, 404–05 (Ark. 2007); *Burton v. Mottoliese*, 835 A.2d 998, 1030–31 (Conn. 2003); *In re Simon*, 913

nal defendant was denied due process because of a biased judge,¹⁵ and arguments regarding judicial incompetence and error on appeal.¹⁶ As in other contexts, the sanctions imposed have been severe, including suspension from the practice of law,¹⁷ and sanctions have sometimes been imposed on the client as well, as in cases where a court strikes a brief or summarily rules against a party as a sanction for the speech.¹⁸ Indeed, citing one such case, the Utah Supreme Court warned criminal defense attorneys to be wary of the "pitfalls" that accompany making arguments that a criminal defendant was denied due process because of a biased judge.¹⁹

As they have done in other attorney-speech cases, courts imposing such discipline have rejected the constitutional standard created in *Sullivan* for punishing speech regarding public officials, which standard

So. 2d 816, 827 (La. 2005) (per curiam); *In re Graham*, 453 N.W.2d 313, 325 (Minn. 1990) (per curiam); Comm. on Legal Ethics of the W. Va. State Bar v. Farber, 408 S.E.2d 274, 286 (W. Va. 1991); Bd. of Prof'l Responsibility, Wyo. State Bar v. Davidson, 205 P.3d 1008, 1017–18 (Wyo. 2009); see also U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 864, 867 (9th Cir. 1993); Fla. Bar v. Ray, 797 So. 2d 556, 560 (Fla. 2001) (per curiam). But see United States v. Brown, 72 F.3d 25, 29 (5th Cir. 1995); *In re Green*, 11 P.3d 1078, 1086–87 (Colo. 2000) (per curiam).

¹⁴ See, e.g., *Ramirez v. State Bar of Cal.*, 619 P.2d 399, 402, 406 (Cal. 1980); *In re Shearin*, 765 A.2d at 937–39; *In re Shimek*, 284 So. 2d 686, 690 (Fla. 1973); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 523 (Iowa 1996); Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Horak, 292 N.W.2d 129, 130 (Iowa 1980); *In re Meeker*, 414 P.2d 862, 868 (N.M. 1966).

¹⁵ See, e.g., *State v. Santana-Ruiz*, 167 P.3d 1038, 1044–45 (Utah 2007); see also *In re Frerichs*, 238 N.W.2d 764, 767, 770 (Iowa 1976).

¹⁶ See, e.g., *In re Wilkins*, 777 N.E.2d 714, 719 (Ind. 2002) (per curiam); *In re Frerichs*, 238 N.W.2d at 767, 770; *Peters v. Pine Meadow Ranch Home Ass'n*, 151 P.3d 962, 967–68 (Utah 2007).

¹⁷ See, e.g., *Sandlin*, 12 F.3d at 864, 868 (six-month suspension); *Stilley*, 259 S.W.3d at 404–05 (six-month suspension); *Peters v. State Bar of Cal.*, 26 P.2d 19, 22 (Cal. 1993) (per curiam) (three-month suspension); *Ramirez*, 619 P.2d at 406 (one-year suspension); *In re Shimek*, 284 So. 2d at 690 (written apology accepted in lieu of twenty-day suspension); *In re Wilkins*, 777 N.E.2d at 719 (thirty-day suspension), modified by 782 N.E.2d 985, 987 (Ind. 2003) (reducing sanction to reprimand); *In re Becker*, 620 N.E.2d 691, 694 (Ind. 1993) (per curiam) (thirty-day suspension); Ky. Bar Ass'n v. Waller, 929 S.W.2d 181, 183 (Ky. 1996) (six-month suspension); *In re Simon*, 913 So. 2d at 827 (six-month suspension with all but thirty days deferred); La. State Bar Ass'n v. Karst, 428 So. 2d 406, 411 (La. 1983) (one-year suspension); *In re Graham*, 453 N.W.2d at 325 (sixty-day suspension); *In re Glauber*, 152 A. 650, 652 (N.J. 1930) (one-year suspension); *Gardner*, 793 N.E.2d at 433 (six-month suspension); *Farmer v. Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn.*, 660 S.W.2d 490, 492 (Tenn. 1983) (sixty-day suspension); *Pilli v. Va. State Bar*, 611 S.E. 2d 389, 392 (Va. 2005) (ninety-day suspension); *Davidson*, 205 P.3d at 1018 (two-month suspension).

¹⁸ See *Stilley*, 259 S.W.3d at 404–05; *McLemore v. Elliot*, 614 S.W.2d 226, 227 (Ark. 1981); *Peters*, 151 P.3d at 964.

¹⁹ *Santana-Ruiz*, 167 P.3d at 1044.

the U.S. Supreme Court applied to statements made by attorneys regarding the judiciary in its 1964 decision, *Garrison v. Louisiana*.²⁰ The rejection of the *Sullivan* standard is particularly surprising because the rule under which discipline or sanctions are generally imposed is Rule 8.2 of the Model Rules of Professional Conduct (“MRPC”), which expressly adopts the *Sullivan* standard and thus only prohibits statements “that the lawyer knows to be false” or that are made “with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”²¹ Importantly, the *Sullivan* standard examines the speaker’s *subjective* intent—thus, punishment is forbidden unless the speaker *subjectively* knew the statements were false or “*in fact entertained serious doubts* as to the truth of his publication.”²² Nevertheless, and in direct contradiction to *Sullivan* and its progeny,²³ attorneys facing discipline for impugning judicial integrity have been required to show that their statements were objectively reasonable in order to obtain constitutional protection.²⁴ Indeed, some courts have denied attorneys any recourse through the First Amendment at all.²⁵ For example, the Missouri Supreme Court has stated that: “[A]n attorney’s voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary.”²⁶

²⁰ See Tarkington, *supra* note 2, at 1587–88. In *Garrison*, a district attorney had been convicted of criminal defamation for publicly attributing “a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations” of particular judges and speculating about “racketeer influences on our eight vacation-minded judges.” See 379 U.S. 64, 65–66 (1964). The Supreme Court reversed the conviction and held—in the very context of attorney speech regarding the judiciary—that “only those false statements made with the high degree of awareness of their probable falsity demanded by [*Sullivan*] may be the subject of either civil or criminal sanctions.” See *id.* at 74.

²¹ See MODEL RULES OF PROF’L CONDUCT R. 8.2 (2009); *Sullivan*, 376 U.S. at 279–80; Tarkington, *supra* note 2, at 1567, 1569.

²² See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added).

²³ See *St. Amant*, 390 U.S. at 731 (explaining that *Garrison* made it “clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing”); *Garrison*, 379 U.S. at 79 (explaining that the *Sullivan* standard is not satisfied by examining the reasonableness of the person in making the statement); see also Tarkington, *supra* note 2, at 1587–88.

²⁴ See Tarkington, *supra* note 2, at 1588–90 (citing cases). Notably, the objective reasonableness standard applied to attorneys comes in two basic variations. See *id.* at 1589. Some courts require attorneys to show that their statements would be made by a reasonable attorney in the same circumstances while others require attorneys to show a reasonable basis of fact for the statements. See *id.* Neither is applied in a manner that is consistent with ordinary applications of similar standards. See *id.* at 1589–90.

²⁵ See, e.g., *Notopoulos v. Statewide Grievance Comm.*, 890 A.2d 509, 521 n.17 (Conn. 2006) (“Several courts have held that attorneys may be punished under the Rules of Professional Conduct for engaging in derogatory speech toward the judiciary even when the speech is protected by the first amendment.”).

²⁶ *In re Westfall*, 808 S.W.2d 829, 834 (Mo. 1991).

Although courts generally apply the same objective reasonableness standard under MRPC 8.2 regardless of the forum where the speech is made,²⁷ courts appear to be more justified in rejecting the subjective *Sullivan* standard where the speech occurs in court filings because of the differences between speech filed with a court and speech that is made outside of a judicial proceeding.²⁸ As Kathleen Sullivan contends in a related context, “the efficient operation of the government sector is incompatible with uninhibited robust, and wide-open debate.”²⁹ Further, attorneys are only allowed to file their statements in court on behalf of clients by virtue of being admitted to the bar of that court.³⁰ Thus the argument made by courts that an attorney agrees to certain restrictions on her speech as a condition of her license to practice law has greater appeal in the context of speech made in court filings than it has where an attorney makes statements in another forum open to public expression.³¹ Moreover, the judicial function is arguably impaired if the subjective *Sullivan* standard is employed for statements of fact regarding the judiciary (or anyone else) made in court filings.³² Courts cannot be expected to rely on statements made in filings that are only supported by the subjective *Sullivan* standard: that is, statements would be permissible as long as the attorney did not know that the statements were false and did not subjectively entertain doubts about the falsity of the statements. Rather, courts do, and should be

²⁷ See Tarkington, *supra* note 2, at 1571–72, 1587–91.

²⁸ See Sullivan, *supra* note 8, at 569, 584; Wendel, *supra* note 8, at 373–74.

²⁹ Sullivan, *supra* note 8, at 587.

³⁰ See, e.g., FED. R. APP. P. 46.

³¹ See Wendel, *supra* note 8, at 373–74, 444. Indeed, the argument has been made that because, prior to admittance to the bar, the attorney did not have the right to file papers with the court on behalf of a client, the attorney is not giving up any of her pre-existing constitutional rights. See *id.* Wendel explains:

The unconstitutional conditions analysis does not apply to many lawyer free expression cases, because the constitutional right that the lawyer claims is infringed is not a right which would exist outside the context in which it was asserted. Suppose a lawyer is disciplined for making racist remarks in a closing argument at trial. It is to no avail to claim that the disciplinary agency is requiring the lawyer to surrender a constitutional right in exchange for the privilege of trying cases before the courts of the state, because the lawyer had no preexisting right to address a jury in a courtroom.

Id. at 373 (footnote omitted).

³² See Tarkington, *supra* note 2, at 1605.

able to, require attorneys making statements in court filings to have some reasonable level of factual basis supporting their statements.³³

Additionally, when making statements about the judiciary in court filings, attorneys are acting as “officers of the court” with specific duties of candor to the tribunal. Some commentators have argued that attorneys therefore have significantly fewer speech rights, if any, when they are acting in this capacity.³⁴ For example, Professors Kathleen Sullivan, W. Bradley Wendel, and others analogize attorney speech to other lines of Free Speech Clause analysis, specifically, speech of public employees, government-funded speech, and speech in a non-public forum.³⁵ As shown below, under any of these analogies, a lawyer would be afforded the right and opportunity to speak regarding the judiciary as a citizen in public arenas, separate from pending cases.³⁶ The lawyer, however, would be subject to greater restrictions—and perhaps lose her First Amendment rights entirely—when making statements in court proceedings.³⁷ Although such a dichotomy would be an improvement over the current regime (where attorneys are denied the ability to impugn

³³ See, e.g., FED. R. CIV. P. 11(b)(3) (requiring that factual contentions “have evidentiary support or, if specifically so identified, will likely have evidentiary support . . .”).

³⁴ See Sullivan, *supra* note 8, at 569, 584. Sullivan explains that “lawyers are sometimes perceived as classic speakers in public discourse” but other times are “thought of as delegates of state power—officers of the court and professional licensees whose special privileges are conditioned upon foregoing some speech rights that others enjoy.” *Id.* at 569. Sullivan further asserts that the lawyer speech cases “reflect a dichotomy between the Court’s treatment of lawyers as participants in ordinary public or commercial discourse on a par with other speakers in those realms, and its treatment of lawyers as subject to some additional speech restrictions by virtue of their ties to state power.” *Id.* at 584.

³⁵ See Sullivan, *supra* note 8, at 584–87 (analogizing attorney speech to speech by public employees, government-funded speech, and speech in a non-public forum); see also Wendel, *supra* note 8, at 375–82 (same); Day, *supra* note 8, at 187–90 (analogizing attorney speech to public employee speech); Caprice L. Roberts, Note, Standing Committee on Discipline v. Yagman: *Missing the Point of Ethical Restrictions on Attorney Criticism of the Judiciary?*, 54 WASH. & LEE L. REV. 817, 846–54 (1997). In her article, Sullivan examines solicitation, advertising, and trial publicity restrictions on attorney speech under the First Amendment. See Sullivan, *supra* note 8, at 570–80. Nevertheless, her premises and ultimate thesis are relevant to the problem of attorney speech regarding the judiciary, particularly when such speech is made in court filings. See *id.*

³⁶ See Wendel, *supra* note 8, at 379.

³⁷ See *id.* For example, Wendel concludes that “it may be helpful to think of lawyers’ speech that is directly related to representing clients as a kind of government-funded expression, to which content-based restrictions may be attached.” *Id.* Similarly, upon analogizing attorney speech to public employees, Terri Day explains “[a] lawyer’s First Amendment rights *may be denied* when he or she speaks in a courtroom as an officer of the court,” and extends this idea to speech in court filings. See Day, *supra* note 8, at 187–88 (emphasis added).

judicial integrity in any forum)³⁸, denying or severely limiting speech rights of attorneys to impugn judicial integrity in court proceedings has serious implications.

Part I of this Article examines why a free speech right to impugn judicial integrity must be recognized for attorneys—even, and perhaps especially, when acting as an officer of the court and filing papers with a court.³⁹ Such a right is necessary to protect the constitutional rights of litigants to an unbiased judiciary, as well as to preserve statutory rights and other protections granted to criminal and civil litigants regarding judicial qualifications.⁴⁰ Further, the recognition of such a right in the attorney preserves both litigants' access to courts and their due process rights.⁴¹ These rights of litigants may be lost or impaired if attorneys can be punished for asserting them in court proceedings.⁴² Moreover, in 2001 the U.S. Supreme Court recognized that a free speech right residing in attorneys to make relevant arguments in court proceedings is essential to the proper functioning of our judicial system.⁴³

Part II analyzes the arguments made by courts and commentators that appear to require quite limited—if any—free speech rights for attorneys to impugn judicial integrity in court proceedings, and shows that none of them are persuasive.⁴⁴ Specifically, in this Part, I scrutinize each of the three proposed analogies to attorney speech when made as an officer of the court: government-funded speech, public employee speech, and speech in a non-public forum.⁴⁵ I then demonstrate that all three analogies fail to take the following into account: (1) the constitutionally required role of the court system as a branch of our government; (2) the constitutional rights of litigants and criminal defendants to access the courts and to protections provided to them within the court system; and (3) the attorney's role in representing a client in an adversarial system of justice.⁴⁶ Additionally, I show that alternate forums to which attorneys have access are severely inadequate because these forums fail to protect the interests of clients in obtaining substan-

³⁸ See Tarkington, *supra* note 2, at 1571–72.

³⁹ See *infra* notes 54–177 and accompanying text.

⁴⁰ See *infra* notes 54–134 and accompanying text.

⁴¹ See *infra* notes 135–177 and accompanying text.

⁴² See *infra* notes 163–177 and accompanying text.

⁴³ See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001).

⁴⁴ See *infra* notes 178–335 and accompanying text.

⁴⁵ See *infra* notes 178–297 and accompanying text.

⁴⁶ See *infra* notes 178–297 and accompanying text.

tive relief from judicial abuses in the underlying proceeding.⁴⁷ Similarly, I evaluate the argument that attorneys lack free speech rights in court proceedings because, prior to being admitted to the bar, they had no right to communicate with courts on behalf of others.⁴⁸ As illustrated in Part II, this argument utterly fails to protect the constitutional and other rights of clients to fair judicial proceedings and adequate representation by legal counsel.⁴⁹

Finally, Part III explains how the legitimate interests of courts, attorneys, and litigants can be accommodated—even when employing the subjective *Sullivan* standard in punishing speech for impugning judicial integrity or harming judicial reputation.⁵⁰ A number of content- and viewpoint-neutral rules require attorneys to have a reasonable factual basis for statements they make in court filings and proceedings.⁵¹ Where an attorney makes a statement that would violate Rule 11 of the Federal Rules of Civil Procedure (“FRCP”) or Rule 3.1 of the MRPC, courts can punish attorneys for this behavior to the same extent that they punish attorneys for violating the rules involving statements made about opposing parties or other non-judicial actors.⁵² But when courts require attorneys to make a stronger factual showing than is required by these rules when criticizing a member of the judiciary, or punish attorneys separately and more harshly for impugning judicial integrity, courts are punishing attorneys for impugning judicial reputation and must comply with the subjective *Sullivan* standard.⁵³

I. ATTORNEY & CLIENT FREE SPEECH RIGHTS IN COURT PROCEEDINGS

A. Attorneys’ Free Speech Rights Are Essential to Protecting the Rights of Litigants

“[A]bstract discussion is not the only species of communication which the Constitution protects”; rather, the First Amendment also protects “litigation . . . [as] a means for achieving the lawful objectives of equality of treatment by all government.”⁵⁴ The U.S. Supreme Court so held in 1963, in *NAACP v. Button* when it struck down as unconstitu-

⁴⁷ See *infra* notes 298–309 and accompanying text.

⁴⁸ See *infra* notes 310–335 and accompanying text.

⁴⁹ See *infra* notes 310–335 and accompanying text.

⁵⁰ See *infra* notes 336–391 and accompanying text.

⁵¹ See *infra* notes 352–354 and accompanying text.

⁵² See *infra* notes 355–367 and accompanying text.

⁵³ See *infra* notes 388–391 and accompanying text.

⁵⁴ *NAACP v. Button*, 371 U.S. 415, 429 (1963).

tional Virginia's regulation on attorney speech that prohibited certain forms of solicitation, including the NAACP's solicitation and instigation of desegregation lawsuits.⁵⁵ The Court noted, "whatever may be or may have been true of suits against government in other countries," in the United States, litigants have "First Amendment rights to enforce constitutional rights through litigation."⁵⁶ The *Button* Court relied upon the First Amendment rights to associate and to petition for redress of grievances, as well as the "protected freedoms of expression," guaranteed by the Free Speech Clause.⁵⁷ The Court explained that for the NAACP:

[L]itigation is not a technique of resolving private differences; it is a *means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.* Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government, *litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.*⁵⁸

Notably, in *Button* the Court recognized a Free Speech Clause right belonging to the regulated attorney.⁵⁹ This right of expression for the attorney was essential to preserve the right, held by those people who would be represented by the NAACP, to petition the government through litigation.⁶⁰ Virginia technically had only foreclosed *attorney speech*—but that restriction on attorney speech had the effect of (and

⁵⁵ See *id.* at 439–40.

⁵⁶ *Id.*

⁵⁷ See *id.* at 437, 438 (holding that the Virginia regulation on solicitation of legal business "violates the Fourteenth Amendment by unduly inhibiting protected freedoms of expression and association" and that the regulation constituted a "serious encroachment . . . upon protected freedoms of expression") (emphasis added).

⁵⁸ *Id.* at 429–30 (emphasis added). The Court also noted that the same rights of expression existed for those opposing the objectives of the NAACP. See *id.* at 444.

⁵⁹ See *id.* at 438–39 (explaining that the regulation created a "serious encroachment . . . upon protected freedoms of expression" despite Virginia's interest in regulating attorneys and that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights").

⁶⁰ *Button*, 371 U.S. at 437–39.

apparently was intended to have the effect of)⁶¹ denying African-Americans the ability to assert their constitutional rights by means of desegregation litigation. The *Button* Court emphasized that the racial setting of the lawsuit was “irrelevant to the ground of our decision” and that the First Amendment protections recognized by the Court would apply equally in other circumstances.⁶²

In like manner, regulations punishing and deterring attorneys from speech that impugns judicial integrity in court proceedings can have the effect of denying litigants their underlying rights to pursue claims in litigation. As in *Button*, the speech regulation on attorneys affects the ability of litigants to enforce or pursue their rights through litigation. As described more fully below, litigants have constitutional rights to fair proceedings and an unbiased judiciary.⁶³ Litigants also have access to courts and due process rights to assert and present their claims in litigation.⁶⁴ To the extent that courts can curtail attorneys from, and punish them for, making arguments regarding judicial bias, incompetence, abuse, and error, the corresponding rights of litigants—including criminal defendants—are lost.

1. The Right to an Unbiased Judiciary

The U.S. Supreme Court has repeatedly recognized that “[t]rial before ‘an unbiased judge’ is essential to due process”⁶⁵—and this is so in both criminal⁶⁶ and civil proceedings.⁶⁷ As it elaborated in 1955, in

⁶¹ See *id.* at 445–46 (Douglas, J., concurring) (examining the history of the regulation as one of the “various steps taken by Virginia to resist our *Brown [v. Board of Education]* decision”).

⁶² *Id.* at 444–45.

⁶³ See *infra* notes 65–94 and accompanying text.

⁶⁴ See *infra* notes 95–134 and accompanying text.

⁶⁵ *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971).

⁶⁶ See, e.g., *Bracy v. Gramley*, 520 U.S. 899, 908–09 (1997) (allowing discovery on a petition for habeas corpus to obtain evidence of judicial bias in petitioner’s murder trial); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (finding a violation of due process from traffic convictions in the local mayor’s court); *In re Murchison*, 349 U.S. 133, 139 (1955) (holding that the due process requirement of an impartial tribunal was violated where the judge presiding at the contempt hearing had also served as the “one-man grand jury” from which the contempt charges arose); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (finding due process violated where the mayor who served as the judge had direct pecuniary interest in the outcome of the case and an official motive to convict in order to help serve the financial needs of the village).

⁶⁷ See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2264–65 (2009) (concluding that due process was denied to litigant because of judicial bias in civil tort case); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 823–25 (1986) (finding a violation of due process because of judicial bias in a civil insurance case).

In re Murchison: “A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.”⁶⁸ Indeed, in 2009, the Court in *Caperton v. A.T. Massey Coal Co.* held that an objective “potential” or “probability of bias” by a judge or decisionmaker can reach unconstitutional proportions and deny a litigant due process.⁶⁹

The right to an unbiased judiciary is particularly compelling in criminal cases, where a person’s life or liberty is placed in the hands of a judge as an instrument of state power. Consequently, “[n]o matter what the evidence [is] against [a criminal defendant], he ha[s] the right to have an impartial judge.”⁷⁰ Further, due process is not satisfied by invoking an assumption that judges are above common failings of other men and women.⁷¹ As the Supreme Court explained:

[T]he requirement of due process of law in judicial procedure is *not* satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer *a possible temptation to the average man* as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.⁷²

The Supreme Court in *Caperton* reaffirmed this statement as “the controlling principle.”⁷³ Although the *Caperton* Court repeatedly noted that the criteria for finding a violation of due process “cannot be defined with precision,”⁷⁴ it held that the inquiry is “objective” and does “not require proof of actual bias.”⁷⁵ Instead, it requires, “under a realistic

⁶⁸ 349 U.S. at 136; *see also Caperton*, 129 S. Ct. at 2259 (quoting *In re Murchison* in stating: “[I]t is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’”).

⁶⁹ 129 S. Ct. at 2262. *See generally* Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Robert’s Concerns in Caperton and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 Sw. L. Rev. 101 (2009) (providing a discussion of the factual background of *Caperton* and thoughtful responses to the hypothetical problems raised by the *Caperton* dissent).

⁷⁰ *Tumey*, 273 U.S. at 535.

⁷¹ *See id.* at 532.

⁷² *Id.* (emphasis added and footnotes omitted).

⁷³ 129 S. Ct. at 2260.

⁷⁴ *Id.* at 2261, 2265.

⁷⁵ The Court noted, however, that “actual bias, if disclosed, no doubt would be grounds for appropriate relief.” *Id.* at 2263.

appraisal of psychological tendencies and human weakness,” a determination of “whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional ‘potential for bias.’”⁷⁶

The Court noted that its objective test “may sometimes *bar* trial by judges *who have no actual bias* and who *would do their very best to weigh the scales of justice equally* between contending parties.”⁷⁷ It is important to recognize that if due process sometimes *bars* an unbiased, upright judge from hearing a case, then certainly *challenges* to judges in papers filed with courts may include challenges against judges who are in fact unbiased and upright. Attorneys should and must be able to assert and preserve their client’s due process rights even when doing so results in attacking the neutrality or integrity of a judge who in actuality is unbiased and fair. Nevertheless, courts have required attorneys to prove the truth of allegations of bias or improper purpose—often extremely strictly⁷⁸ and with an exaggerated view of the assertions made by attorneys.⁷⁹

Not all questions regarding judicial qualification violate or even implicate due process.⁸⁰ Although due process “establishes a constitutional floor,”⁸¹ both Congress and the states have imposed more strin-

⁷⁶ *Id.* at 2262, 2263 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (internal quotations omitted)).

⁷⁷ *Id.* at 2265 (quoting *In re Murchison*, 349 U.S. at 136) (explaining that “objective standards may . . . require recusal whether or not actual bias exists or can be proved”) (emphasis added).

⁷⁸ *See, e.g.*, *Burton v. Mottolose*, 835 A.2d 998 (Conn. 2003); *In re Wilkins*, 777 N.E.2d 714 (Ind. 2002); *see also* Tarkington, *supra* note 2, at 1591 & nn.150–53.

⁷⁹ *See, e.g.*, *In re Frerichs*, 238 N.W.2d 764, 765 (Iowa 1976). In *In re Frerichs*, a criminal defense attorney wrote in a petition for rehearing that the court “willfully avoid[ed and] refuse[d] to address themselves to the merits of a defendant’s substantial constitutional claims,” thus violating the defendant’s “rights to due process and equal protection of the laws.” *Id.* (quotations omitted). The Court construed this statement thus:

Respondent’s assertions easily could be said to allege commission of public offenses. Setting aside the concept of judicial immunity we note that, under § 740.3, The Code, it would be an indictable misdemeanor for any judge to willfully and maliciously oppress any person under pretense of judicial capacity. . . . [I]t would be a felony for judges to conspire to injure, oppress, threaten, or intimidate any citizen in the exercise of a constitutional right. We find respondent’s assertions unprofessional because they attribute to this court sinister, deceitful and unlawful motives and purposes.

Id. at 767; *see also* Tarkington, *supra* note 2, at 1591 n.153.

⁸⁰ *See, e.g.*, *Bracy*, 520 U.S. at 904 (“Of course, most questions concerning a judge’s qualifications to hear a case are not constitutional ones”); *see also* *Caperton*, 129 S. Ct. at 2259 (“[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level.”) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948)).

⁸¹ *Bracy*, 520 U.S. at 904.

gent requirements for judicial disqualification.⁸² Under 28 U.S.C. § 455, for example, disqualification of a federal judge or magistrate is required “in any proceeding in which his *impartiality might reasonably be questioned*”—in addition to requiring judicial disqualification in specified circumstances involving impediments such as personal bias or prejudice, personal knowledge of evidentiary facts, or pecuniary interest in or certain familial or professional connections with a particular proceeding.⁸³ Further, under the American Bar Association’s Model Code of Judicial Conduct (“Model Code”), applicable in the majority of states,⁸⁴ judicial disqualification is required under similar circumstances, including in

⁸² Cf. *Lavoie*, 475 U.S. at 829 (“The Due Process Clause demands only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.”).

⁸³ 28 U.S.C. § 455(a),(b) (2006) (emphasis added). In the 1993 case *Liteky v. United States*, the U.S. Supreme Court interpreted § 455(a)’s requirement of disqualification “in any proceeding in which [a judge’s] impartiality might reasonably be questioned” to generally be limited by the “extrajudicial source doctrine,” which requires that the impartiality come from some factor or source outside of the judicial proceeding itself. See 510 U.S. 540, 554–55 (1993). Thus, “opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Id.* at 555. Of course, it would be very hard to make a showing that “fair judgment” is “impossible” in a particular case. The Court thus concluded that “judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge” unless they reveal “an opinion that derives from an extrajudicial source” or “such a high degree of favoritism or antagonism as to make fair judgment impossible.” *Id.*

Thus, attorneys whose clients (or who themselves) are abused by judicial hostility and seek disqualification of the judge under § 455 generally have to show that the source of that hostility came from something other than what the judge learned or heard during the course of the pending matter. As the *Liteky* majority elaborated, “[n]ot establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.” See *id.* at 555–56.

The four justices concurring in the judgment in *Liteky* argued that “[t]he statute does not refer to the source of the disqualifying partiality.” *Id.* at 558 (Kennedy, J., concurring in the judgment). Thus, regardless of whether the source is “extrajudicial or intrajudicial,” disqualification should be “triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge’s rulings or findings.” *Id.* at 557–58.

⁸⁴ In 2007, the American Bar Association modified its Code of Judicial Conduct. Forty-one states have adopted or are in the process of reviewing and adopting the new Code or modifications thereof. See Status of State Review of ABA Model Code of Judicial Conduct (2007), http://www.abanet.org/cpr/jclr/jud_status_chart.pdf (last visited Mar. 12, 2010); see also *Caperton*, 129 S. Ct. at 2266 (noting that “[a]lmost every State . . . has adopted the American Bar Association’s objective standard”).

proceedings where “the judge’s impartiality might reasonably be questioned”⁸⁵ or when a judge “has a personal bias or prejudice concerning a party or a party’s lawyer.”⁸⁶ The Model Code also requires disqualification if a judge, outside of a court opinion, “has made a public statement . . . that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding.”⁸⁷

Of course, in order for litigants to meaningfully assert any of these rights, attorneys must be allowed to express them. Additionally, attorneys may make statements that allegedly impugn judicial integrity in appellate briefs in order to seek reassignment of the case to a different judge on remand. In most of the federal appellate courts and in several states, reassignment is granted based on the weighing of three factors, including “whether reassignment is advisable to preserve the appearance of justice.”⁸⁸ Other federal and state appellate courts examine whether reassignment is necessary to “preserve not only the reality but also the appearance of the proper functioning of the judiciary as a neu-

⁸⁵ MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

⁸⁶ *Id.* R. 2.11(A) (1).

⁸⁷ *Id.* R. 2.11(A) (5).

⁸⁸ *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977). The factors are:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Id. These three factors comprise the *Robin* test, which has been adopted by the U.S. Courts of Appeals for the First, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits. *See United States v. Guglielmi*, 929 F.2d 1001, 1007 (4th Cir. 1991); *United States v. White*, 846 F.2d 678, 696 (11th Cir. 1989); *Simon v. City of Clute*, 825 F.2d 940, 943–44 (5th Cir. 1987); *Maldonado Santiago v. Velazquez Garcia*, 821 F.2d 822, 832 (1st Cir. 1987); *Bercheny v. Johnson*, 633 F.2d 473, 476–77 (6th Cir. 1980); *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979). The Tenth Circuit and the District of Columbia Circuit have also expressed approval for the *Robin* test. *See O’Rourke v. City of Norman*, 875 F.2d 1465, 1475 (10th Cir. 1989) (expressing approval but hesitating to order reassignment); *Grace v. Burger*, 665 F.2d 1193, 1207 (D.C. Cir. 1981), *aff’d in part, vacated in part sub nom.* *United States v. Grace*, 461 U.S. 171 (1983) (citing with approval).

Several states have also adopted or looked to the *Robin* factors, including Massachusetts, Florida, Delaware, Alabama, Michigan, Montana, and New Mexico. *See, e.g., C.D.S. v. K.S.S.*, 978 So. 2d 782, 790 (Ala. Civ. App. 2007); *Beck v. Beck*, 766 A.2d 482, 485 (Del. 2001); *Spivey v. State*, 512 So. 2d 322, 324 (Fla. Dist. Ct. App. 3d Dist. 1987); *Commonwealth v. Henriquez*, 796 N.E.2d 843, 844 (Mass. 2003); *People v. Murray*, No. 268836, 2007 WL 1791892, at *4 (Mich. App. June 21, 2007) (unpublished opinion); *State v. Smith*, 863 P.2d 1000, 1016 (Mont. 1993); *State v. Ricky G.*, 798 P.2d 596, 599 (N.M. Ct. App. 1990).

tral, impartial administrator of justice”⁸⁹ or whether “impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case.”⁹⁰

These tests make discussion in an appellate brief about the impartiality or potential bias of a judge relevant where reassignment upon remand is sought. Further, in reassigning cases, courts have granted (as well as denied) reassignment on the basis that the judge expressed hostility or frustration toward one of the litigants or her attorney.⁹¹ Some cases have considered erroneous and adverse rulings against one party in determining that there was an appearance of impartiality sufficient to grant reassignment.⁹² Although not rising to the level of a constitutional right, where courts provide for reassignment on remand and a litigant would benefit therefrom, an attorney must be allowed to express concerns of partiality or other defects in order to assert that interest of the client. This is so even where the court ultimately decides not to reassign the case.

Finally, it is the very function of appellate attorneys in our system of justice to highlight the failings of the lower court’s handling of, and decision in, the case in order to obtain a reversal for their clients. Although a number of cases indicate that some appellate attorneys go further than they need or than is wise by attributing nefarious motives to

⁸⁹ *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 167 (3d Cir. 1993); *accord* *Wright v. Moore*, 953 A.2d 223, 227 n.13 (Del. 2008) (examining “whether there is an appearance of bias sufficient to cause doubt about the judge’s impartiality”).

⁹⁰ *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 904 (8th Cir. 2009); *accord* *People v. Enriquez*, 160 Cal. App. 4th 230, 244 (Ct. App. 2008) (indicating that reassignment is necessary “[i]f a reasonable man would entertain doubts concerning the judge’s impartiality”).

⁹¹ *See, e.g., Sentis Group*, 559 F.3d at 904–05 (requiring reassignment where a judge expressed hostility to the plaintiffs and made adverse rulings); *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 142 (2d Cir. 2007) (assigning the case to a different judge on remand where the prior judge made comments regarding appellant’s credibility).

⁹² *See Sentis Group*, 559 F.3d at 904–05 (noting that in addition to expressing hostility to the plaintiffs, the court denied the plaintiffs an opportunity to respond during a sanctions hearing and misconstrued its own discovery orders in adopting the defendant’s mischaracterization thereof). *See generally* *Rhodes v. Avon Prods., Inc.*, 504 F.3d 1151 (9th Cir. 2007) (examining partiality of the court based on rulings favorable to one side, including granting a motion to dismiss without allowing the party against whom it was granted an opportunity to respond); *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353 (9th Cir. 2005) (examining prior court rulings to determine whether there was an appearance of bias and ordering reassignment); *Mitchell v. Maynard*, 80 F.3d 1433 (10th Cir. 1996) (considering appellant’s evidence of bias including prior adverse rulings and finding reassignment appropriate).

the lower court or exaggerating the error,⁹³ the question becomes whether they, their clients, or both should be punished for so doing. As will be briefly discussed below, where the error of the attorney is something that would be punished if the speech concerned another participant or assertion—for example, for being frivolous or lacking a basis in fact, or being irrelevant—then the judiciary should punish the speech only to the extent that they would punish it if it concerned another actor.⁹⁴ To the extent that the standard applied or the sanction imposed is more stringent than it would be in another context, then the judiciary is merely protecting its own reputation and the *Sullivan* standard should apply.

Where attorneys are asserting, on behalf of their clients, constitutional or statutory rights to an impartial judiciary or are seeking reassignment on remand, they must be allowed to make arguments and assertions of bias or impropriety by the lower court. If attorneys are punished or deterred from bringing such claims, the underlying rights of the litigants are lost.

2. Access to Courts and Due Process Rights

The U.S. Supreme Court has recognized a constitutional right to access the courts for both criminal and civil litigants. Although the precise constitutional source and scope of this right have remained unclear,⁹⁵ the Court has recognized that the Due Process Clause provides a “meaningful” and “fundamental right of access to the courts,” securing rights of access for criminal defendants,⁹⁶ civil rights litigants,⁹⁷ and those being denied fundamental rights over which state courts have a

⁹³ See, e.g., *Peters v. Pine Meadow Ranch Home Ass’n*, 151 P.3d 962, 964–66 (Utah 2007); *In re Wilkins*, 777 N.E.2d 714, 716 (Ind. 2002) (per curiam); *In re Graham*, 453 N.W.2d 313, 322–24 (Minn. 1990).

⁹⁴ See *infra* notes 388–391 and accompanying text.

⁹⁵ See *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (explaining that “[d]ecisions of this Court have grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses” (citations omitted)).

⁹⁶ See, e.g., *Bounds v. Smith*, 430 U.S. 817, 821 (1977) (stating that “[i]t is now established beyond doubt that prisoners have a constitutional right of access to the courts”); *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (“[I]t is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.”).

⁹⁷ See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 555–58 (1974) (holding that prison disciplinary proceedings must be governed by a mutual accommodation between the institution’s needs and objectives and generally applicable constitutional requirements).

monopoly.⁹⁸ The Court has also recognized an access right arising from the First Amendment's Petition Clause under which civil litigants have a right to bring—and thus cannot be punished for bringing—non-frivolous claims, including state and common law claims.⁹⁹

The Court has held that, regardless of the constitutional basis for the right of access to the courts, the litigant claiming denial of access must establish an underlying claim that has been impeded or a right that has been foreclosed from being pursued in court.¹⁰⁰ Thus, the person claiming denial of access “must identify a ‘nonfrivolous,’ ‘arguable’ underlying claim.”¹⁰¹ In the context of speech impugning judicial integrity, litigants have underlying rights to fair proceedings from an impartial judge as outlined above.¹⁰² By threatening punishment for bringing such claims, attorneys are deterred from asserting or strongly pursuing them, and thus the judiciary has created an impediment to raising them.¹⁰³ Moreover, in cases where a court strikes a filing or summarily affirms a lower court's ruling as a sanction, the litigant has been denied access to assert his underlying right.

Under the Petition Clause of the First Amendment, the U.S. Supreme Court has held that a civil litigant cannot be sanctioned or punished for bringing a non-frivolous claim in court.¹⁰⁴ For example, in the antitrust context, the Court has held that litigants who file a non-frivolous lawsuit against a competitor cannot be held liable for engaging in anti-competitive conduct by filing the lawsuit—even if they have an anti-competitive motive in filing the suit. That is, a company with a non-frivolous claim against a competitor has a right to petition the courts for redress of grievances and cannot be punished for filing the claim under the federal antitrust laws.¹⁰⁵ Thus, in the 1993 case *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, Colum-

⁹⁸ See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–19, 127–28 (1996); *Boddie v. Connecticut*, 401 U.S. 371, 377, 380–81 (1971).

⁹⁹ See *Harbury*, 536 U.S. at 414–15; see also *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 62–63 (1993); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983).

¹⁰⁰ See *Harbury*, 536 U.S. at 414–15.

¹⁰¹ See *id.* at 415.

¹⁰² See *supra* notes 65–94 and accompanying text.

¹⁰³ See, e.g., *State v. Santana-Ruiz*, 167 P.3d 1038, 1044 (Utah 2007) (warning criminal defense attorneys of the pitfalls that may accompany making an argument of judicial bias and citing to a civil case where the court summarily affirmed an erroneous decision of the lower court).

¹⁰⁴ See, e.g., *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 62–63; *Bill Johnson's Rests., Inc.*, 461 U.S. at 743.

¹⁰⁵ See *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 62–63.

bia Pictures sued Professional Real Estate Investors (“PRE”) for copyright infringement.¹⁰⁶ PRE then counterclaimed, alleging that Columbia Pictures’ copyright claim was a “sham that cloaked underlying acts of monopolization and conspiracy to restrain trade” in violation of the antitrust laws.¹⁰⁷ Columbia Pictures’ claim for copyright infringement was ultimately unsuccessful.¹⁰⁸ Nevertheless, the Court held that Columbia Pictures had a right to pursue the claim under the Petition Clause and therefore could not be punished for filing the lawsuit under federal antitrust laws.¹⁰⁹ Indeed, the Court held that in order to be liable under the antitrust laws for pursuing litigation against a competitor, the claims asserted must be “objectively baseless.”¹¹⁰ That is, under the Petition Clause, in order for someone to be punished for filing civil claims, the claims must be “so baseless that no reasonable litigant could realistically expect to secure favorable relief.”¹¹¹ In other words, to be protected under the Petition Clause from punishment for instituting civil proceedings, a litigant is required to have “no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication.”¹¹²

Similarly, in the 1983 case *Bill Johnson’s Restaurants, Inc. v. NLRB*, the U.S. Supreme Court held that, under the Petition Clause, the filing of a civil lawsuit cannot be an unfair labor practice in violation of the National Labor Relations Act (“NLRA”) unless the claim is “baseless.”¹¹³ The Court explained its holding by reasoning that “baseless litigation is not immunized by the First Amendment right to petition.”¹¹⁴ Consequently, if a “plaintiff’s position is plainly foreclosed as a matter of law or is otherwise frivolous,” then the litigation can be enjoined by the National Labor Relations Board (“NLRB”) as an unfair labor practice.¹¹⁵ But “if there is any realistic chance that the plaintiff’s legal theory might be adopted,” then the claims are protected by the Petition Clause and the litigation cannot be enjoined.¹¹⁶

¹⁰⁶ *Id.* at 52.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 53.

¹⁰⁹ *Id.* at 62–63.

¹¹⁰ *Id.* at 60.

¹¹¹ *Prof’l Real Estate Investors, Inc.*, 508 U.S. at 62.

¹¹² *Id.* at 62–63 (quotation omitted).

¹¹³ 461 U.S. at 743.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 747.

¹¹⁶ *Id.*

Therefore, litigants have a right under the Petition Clause to access the courts and bring civil claims—even non-constitutional claims based solely on state or federal law—and thus cannot be punished for bringing such claims, or enjoined from so doing, unless their claims are objectively baseless.¹¹⁷ Litigants claiming that they were, or will be, denied due process by a biased or partial judge are protected by the Petition Clause, which requires that the litigants *not* be punished unless the claims are “baseless.” Notably, “baseless” does not mean that the claim ultimately is unsuccessful. In *Professional Real Estate Investors*, the copyright infringement claim ultimately was unsuccessful, yet Columbia Pictures was protected from punishment under the antitrust laws because the claim was not “so baseless that no reasonable litigant could realistically expect to secure favorable relief”¹¹⁸ or, in the words of the *Bill Johnson’s* Court, the claim was not “plainly foreclosed as a matter of law or . . . otherwise frivolous.”¹¹⁹

If Congress and government agencies like the NLRB are prohibited by the Petition Clause from punishing litigants who bring civil law claims unless the claims are objectively baseless, state and federal judiciaries, who are likewise bound by the Petition Clause, should not be able to punish litigants for bringing claims that are not objectively baseless, even if the arguments or claims involve impugning judicial integrity. Although the Petition Clause right belongs to litigants and not to their attorneys, the right is all but lost if, despite the client’s constitutional right to bring the claim or assert his legal rights, the attorney is prohibited from expressing it in court filings and proceedings.¹²⁰ The

¹¹⁷ See *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 62–63; *Bill Johnson's Rests., Inc.*, 461 U.S. at 743; see also MONROE H FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 22–26, 100–01 (3rd ed. 2004) (explaining that “there is a First Amendment right to petition for redress of grievances by litigating civil cases” and stating that “judges who have imposed sanctions against lawyers have typically ignored the *constitutional limitations* [as established in *Professional Real Estate Investors*] on sanctioning lawyers for frivolous pleadings”) (emphasis added).

¹¹⁸ 508 U.S. at 62.

¹¹⁹ 461 U.S. at 747.

¹²⁰ Cf. Carol Rice Andrews, *The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct*, 24 J. LEGAL PROF. 13, 71 (2000). Notably, Carol Andrews argues that the right of access to courts under the First Amendment applies only to the filing of claims and counterclaims—accessing courts initially—and does not apply at all to the filing of subsequent papers in court, such as motions. See *id.* Nevertheless, Andrews argues that the Due Process Clause protects the filing of “civil papers other than the initial complaint” and requires that regulations regarding them be “reasonable,” albeit not rising to the protection afforded by the Petition Clause. See *id.* I do not read the case law as compelling such a limited right. Andrews declares that her dichotomy is justified because “the interest in preserving free motion practice is far less than that in preserving initial access

client would either have to proceed *pro se*, waive the right, or risk having his attorney punished. As Carol Andrews has argued regarding other Rules of Professional Conduct:¹²¹

In theory, even if the prohibition applies, the client is free to file the suit on his own, without the assistance of a lawyer. Yet, the prohibition unquestionably impacts the client. A typical plaintiff would be impeded, if not completely thwarted, in his attempt to gain access to court if he could not use the services of a lawyer.¹²²

Again, it becomes necessary to recognize the *attorney's* free speech right to express relevant and non-frivolous arguments and claims of her client in court proceedings even if they impugn judicial integrity. The free speech right of attorneys to impugn judicial integrity in court proceedings is essential to preserving the litigant's constitutional right to access courts and assert non-baseless claims under the Petition Clause.

to court to present a claim for relief" and that "[m]otions have less justification and more danger of abuse." *Id.* at 73–74. Andrews' dichotomy is superficial. A motion for disqualification of a judge may raise a constitutional right to an unbiased judiciary—and denial of that motion may result in a denial of due process. An appellant asserting that she was denied due process because of a biased judge is petitioning the government (the appellate court) for a redress of grievances. A defense—though not a claim found in the complaint or a counterclaim—may assert important constitutional and statutory rights and may equally protect the defendant's right to petition for redress of grievances that arise from being subjected to suit or prosecution. It is my contention that the right to petition for redress of grievances does not discriminate on the basis of whether the assertion is made in a motion or in a complaint, or whether it is a claim, a defense, or something else. Rather, the relevant determinant should be whether the litigant (as a plaintiff or defendant) is asserting a legally cognizable right. If the litigant is pursuing a legally cognizable right—whether in a motion, in a complaint, on appeal, or as a defense to a claim—then he is petitioning the government for redress and is protected from punishment as long as his assertion of entitlement under that right is non-frivolous.

¹²¹ See *id.* at 60. Andrews argues that motive restrictions of the Rules of Professional Conduct—that is, rules that prohibit filing of claims based on the improper motives of the client or attorney—may run afoul of the Petition Clause to the extent they are used to prohibit or punish filing of non-frivolous claims. Andrews further asserts that because the restrictions are only on attorney actions and not litigant's actions, they "do not directly regulate the protected right but instead only indirectly impede or deter exercise of the right" and thus it is necessary to engage in a "breathing room analysis," by considering the "degree of intrusion" and "impact on the core right" from the rule. See *id.* Andrews then argues that "a law affirmatively *banning* assistance of a lawyer is a significant enough intrusion to require strict scrutiny of that law." *Id.* at 64.

My argument is distinctly different: The client's right to access the courts and assert legal rights that may impugn judicial integrity demonstrates the necessity of recognizing a free speech right residing in the attorney to assert such claims on the client's behalf.

¹²² *Id.* at 60.

Cases recognizing a court access right arising from the Due Process Clause have mainly involved criminal defendants. Again, courts have punished attorneys for impugning their integrity in criminal as well as civil proceedings. Under the Due Process Clause, the U.S. Supreme Court has repeatedly recognized a prisoner's "right to bring to court a grievance that the inmate wished to present."¹²³ Thus prisoners have an access right to assert—whether during trial, on appeal, or in habeas petitions—claims that they are, or were, denied due process because of a biased judge. Indeed, the right of access to courts for criminal defendants and prisoners is intended "to remedy past or imminent official interference with individual inmates' *presentation of claims* to the courts."¹²⁴ A criminal defendant must show that "a nonfrivolous legal claim had been frustrated or was being impeded."¹²⁵ Thus, the Supreme Court has stricken as unconstitutional fees and other financial requirements that barred impoverished defendants from filing appeals or seeking post-conviction relief.¹²⁶ Similarly, restrictions on an attorney's ability to impugn judicial integrity—where the argument is relevant to the underlying claim or motion—can frustrate the bringing or presentation of criminal defendant and prisoner claims of judicial bias.

Additionally, the Court has found unconstitutional certain regulations that restrict the ability of prisoners to obtain legal assistance from other prisoners or from law students and paraprofessionals.¹²⁷ The Court explained that "[r]egulations and practices that unjustifiably *obstruct the availability of professional representation* or other aspects of the right of access to the courts are invalid."¹²⁸ This aspect of the right to court access gets to the crux of the problem with restrictions that punish attorney speech made in pursuit of a claim of judicial bias or incompetence: Although it is only the attorney's speech that is prohibited, the criminal defendant must either abide by that restriction in presenting his claim or proceed without an attorney. Such regulations, therefore, frustrate professional representation by curtailing attorney expression even where the attorney is making a relevant argument on behalf of a client.

¹²³ See, e.g., *Lewis v. Casey*, 518 U.S. 343, 354 (1996); *Smith*, 430 U.S. at 821.

¹²⁴ *Casey*, 518 U.S. at 349 (emphasis added).

¹²⁵ *Id.* at 353.

¹²⁶ See, e.g., *Smith v. Bennett*, 365 U.S. 708, 710–11 (1961); *Griffin v. Illinois*, 351 U.S. 12, 13–14 (1956).

¹²⁷ See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled on other grounds by* *Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989); *Johnson v. Avery*, 393 U.S. 483, 484 (1969).

¹²⁸ *Martinez*, 416 U.S. at 419 (emphasis added).

The Court has extended these principles of court access arising under the Due Process Clause to other situations where, as with criminal defendants, the court system is “not only the paramount dispute-settlement technique, but, in fact, the only available one.”¹²⁹ Thus for defendants, as well as for plaintiffs seeking vindication of a fundamental right—such as divorce or termination of parental rights—over which courts have a monopoly in adjudication, the U.S. Supreme Court has recognized a right of access under the Due Process Clause that forbids state imposition of impediments to presentation of claims and defenses, similar to that outlined above for criminal defendants.¹³⁰

In addition to providing a right to access courts, the Due Process Clause in general requires that there be fair proceedings and that “persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”¹³¹ Particularly for criminal and civil defendants, who do not have the option to resort to other forms of dispute resolution, constitutional due process requires state and federal courts “within the limits of practicability” to “afford to all individuals a meaningful opportunity to be heard”¹³²—which means “an opportunity granted at a meaningful time and in a meaningful manner.”¹³³ Although the precise requirements of due process may at times appear rather amorphous,¹³⁴ for the litigant or criminal defendant wishing to present a constitutional claim of judicial bias (or to assert statutory or rule-based rights, such as those calling for a change or disqualification of a judge), a meaningful opportunity to be heard cannot be provided when her attorney is threatened with punishment for impugning judicial integrity.

¹²⁹ See *Boddie*, 401 U.S. at 377.

¹³⁰ See, e.g., *M.L.B.*, 529 U.S. at 105, 117 (termination of parental rights); *Boddie*, 401 U.S. at 377 (divorce proceedings).

¹³¹ *Boddie*, 401 U.S. at 377; see also *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“[M]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”).

¹³² *Boddie*, 401 U.S. at 379.

¹³³ *Id.* at 378.

¹³⁴ For example, in the 1976 case, *Matthews v. Eldridge*, the U.S. Supreme Court created a three-factor balancing test to determine what process is due and if a meaningful opportunity to be heard has been given. See 424 U.S. 319, 335 (1976).

B. *A Free Speech Right to Express Claims and Arguments to a Court*

In addition to being necessary to preserve the underlying rights of clients to an unbiased judiciary, court access, and due process, a free speech right for attorneys to make relevant claims and arguments to a court is essential to the proper functioning of the judicial system, as recognized by the U.S. Supreme Court in 2001, in *Legal Services Corp. v. Velazquez*.¹³⁵

Velazquez involved restrictions placed on attorneys who accepted funds from the congressionally created Legal Services Corporation (“LSC”), which grants money to organizations that provide legal assistance to the poor in non-criminal cases.¹³⁶ At issue were congressionally imposed restrictions on recipients of LSC funds specifically prohibiting them from providing any representation that “involves an effort to amend or otherwise challenge existing welfare laws,” including challenges as to their validity or constitutionality.¹³⁷ Indeed, under the restrictions, if an attorney was already actively representing a client at the time that a constitutional or statutory challenge to welfare laws became evident in the litigation, the attorney was required to withdraw from the representation.¹³⁸ The Court struck down the regulations as violating the First Amendment,¹³⁹ explaining that the restrictions were

inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case. By seeking to *prohibit the analysis of certain legal issues* and to *truncate presentation* to the courts, the enactment under review *prohibits speech and expression* upon which the courts must depend for the proper exercise of the judicial power.¹⁴⁰

The Court further stated that Congress designed the restriction “to insulate current welfare laws from constitutional scrutiny and certain other legal challenges,” which the Court held “implicat[ed] central First Amendment concerns.”¹⁴¹ The First Amendment “was fashioned . . . [to] bring[] about . . . political and social changes.”¹⁴² Thus, Con-

¹³⁵ 531 U.S. 533, 545 (2001).

¹³⁶ *Id.* at 536.

¹³⁷ *Id.* at 536–37.

¹³⁸ *Id.* at 539.

¹³⁹ *Id.* at 549.

¹⁴⁰ *Id.* at 545 (emphasis added).

¹⁴¹ *Velazquez*, 531 U.S. at 547.

¹⁴² *Id.* at 548 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)).

gress could not “impose[] rules and conditions which in effect insulate its own laws from legitimate judicial challenge,”¹⁴³ nor could it “exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider.”¹⁴⁴ The Court concluded: “The Constitution does not permit the Government to confine litigants and their attorneys in this manner.”¹⁴⁵

As applied to the suppression or punishment of speech critical of the judiciary made in court filings, courts should not be able to “impose rules . . . which in effect insulate [their] own [actions] from legitimate judicial challenge”¹⁴⁶ and “exclude from litigation those arguments and theories [that the judiciary] finds unacceptable [or insulting] but which by their nature are within the province of the courts to consider.”¹⁴⁷ Indeed, to the extent that courts seek to prohibit the “analysis of certain legal issues and to *truncate presentation* to the courts” regarding judicial abuse, corruption, or bias, they prohibit the constitutionally protected “speech and expression” of the affected attorneys and their clients.¹⁴⁸

Thus, despite the U.S. Supreme Court’s dicta in the 1991 case of *Gentile v. State Bar of Nevada* indicating that attorneys have virtually no free speech rights in court proceedings,¹⁴⁹ the Court subsequently squarely held in *Velazquez* that attorneys and clients in fact have free speech rights in court filings and proceedings—at least extending protection to expression and presentation of relevant arguments.¹⁵⁰ This holding is consistent with the First Amendment’s core protection for political speech.¹⁵¹ Although arguments made to a court may not generally be viewed as within the tumultuous realm of “uninhibited, robust, wide-open debate” we generally conceive of as political speech, court proceedings are, as the *Velazquez* Court noted, an essential instrument of social and political change in our system of government.¹⁵² Again,

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 546.

¹⁴⁵ *Id.* at 548.

¹⁴⁶ *See id.*

¹⁴⁷ *Velazquez*, 531 U.S. at 546.

¹⁴⁸ *See id.* at 545.

¹⁴⁹ *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991).

¹⁵⁰ *See Velazquez*, 531 U.S. at 548.

¹⁵¹ *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010) (stating that “political speech . . . is central to the meaning and purpose of the First Amendment”) (citing *Morse v. Frederick*, 551 U. S. 393, 403 (2007)).

¹⁵² *See Velazquez*, 531 U.S. at 548 (explaining that the First Amendment “was fashioned . . . [to] bring[] about . . . political and social changes”) (quoting *Sullivan*, 376 U.S. at 269).

this was a central recognition of the U.S. Supreme Court in *Button*—that litigation can be, itself, “a form of political expression” and restrictions on attorney speech (as in *Button*) may violate the Free Speech Clause.¹⁵³

Similarly, as the Court in *Button* recognized, litigation is a method for bringing about social change and vindication of constitutional rights that is accessible by any private person who is injured regardless of the unpopularity of her position.¹⁵⁴ Certainly, private individuals can complain to their congressmen, attempt to enact referenda, vote for and against ballot measures, and vote against legislators and executive members whose actions they disagree with or think are unconstitutional.¹⁵⁵ But the courts are *the* method where a person who is individually injured by a legal or constitutional violation can obtain relief both from future violations (through injunctions) and from past harms (through remedial compensation). Thus, “under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.”¹⁵⁶ As noted above, by denying and deterring *attorneys* from asserting their right to express in court filings arguments of judicial bias, abuse, corruption, and incompetence, the judiciary in turn denies the clients’ rights to access the courts and due process.

Yet even for the litigant not involved in civil rights litigation or attempting to bring about mass social change, but instead involved in litigation between two private parties, that litigation binds and changes the social organization and relationships between people, their relative wealth, and their obligations.¹⁵⁷ Thus, for individuals, litigation is a form of speech that will change the social order as to themselves and others.¹⁵⁸ Indeed,

[p]erhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable man-

¹⁵³ See 371 U.S. at 439–40, 452.

¹⁵⁴ See *id.* at 429.

¹⁵⁵ *Id.* at 429–30.

¹⁵⁶ *Id.* at 430.

¹⁵⁷ *Id.* at 429.

¹⁵⁸ *Id.* at 429, 431.

ner. Without such a “legal system,” social organization and cohesion are virtually impossible¹⁵⁹

It is therefore important that this system—this ability for individuals to call upon the powers of the state to alter their relationship with others—be fair, for fairness is a premise of due process.¹⁶⁰ The specific ability to complain about unfairness and to rectify it in individual cases in the court system, such as those arising from a biased, incompetent, or abusive judge, serves a checking function by which the overall integrity and fairness of the system is monitored and ensured.¹⁶¹ As Vincent Blasi has argued, the ability to check official abuse of power was a fundamental purpose underlying the adoption of the Free Speech Clause.¹⁶² Not only do sanctions for challenging judicial integrity in court proceedings curtail the expression of criticism that could potentially lead the public to employ democratic correctives, such sanctions curtail the corrective itself. The assertions regarding government abuse or unfairness are suppressed in the very forum where they should be remedied.

The ability to resort to the judicial system to assert one’s rights—including one’s rights to a fair proceeding in the court system itself—is part of the American system of self-government.¹⁶³ It has long been recognized that “[t]he right to sue and defend in the courts is the al-

¹⁵⁹ *Boddie*, 401 U.S. at 374.

¹⁶⁰ *Id.* at 374–76. The Court elaborated:

It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State’s monopoly over techniques for binding conflict resolution could hardly said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Id. at 375.

¹⁶¹ *Id.* at 374–75.

¹⁶² See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (arguing that the ability to check official use of power “was uppermost in the minds of the persons who drafted and ratified the First Amendment”); see also Tarkington, *supra* note 2, at 1579–82 (discussing Blasi’s theory and the importance for the checking value of constitutionally protecting attorney speech regarding the judiciary).

¹⁶³ See *Boddie*, 401 U.S. at 374–75.

ternative of force” and thus, “[i]n an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.”¹⁶⁴ Protecting the right and preserving the speech necessary to enable American citizens to govern themselves was one of the central Free Speech Clause theories upon which the U.S. Supreme Court relied in 1964 in *New York Times Co. v. Sullivan*, when it held that speech regarding public officials (including the judiciary) must be constitutionally protected.¹⁶⁵

Indeed, it is important that citizens can challenge governmental action in court proceedings without fear of sanction for impugning government integrity.¹⁶⁶ Freedom of expression does not solely protect uninhibited robust debate on street corners and in newspapers, but as declared in *Button*, also “vigorous advocacy” through the medium of litigation “against governmental intrusion.”¹⁶⁷ For the criminal defendant who believes that her constitutional right to an unbiased judiciary has been violated, her counsel’s ability to freely and vigorously contest the impartiality of the trial judge is the defendant’s only “means for achieving the lawful objectives of equality of treatment by all government”—specifically the judiciary.¹⁶⁸ This proposition may seem obvious as applied to officers of other branches of government.¹⁶⁹ For example, suppose an attorney brought a claim on behalf of a client against a state executive officer for discrimination on the basis of race or some other constitutional violation. If the claim were in fact frivolous or did not comply with Rule 11 of the FRCP or Rule 3.1 of the MRPC, the attorney could certainly be sanctioned under one of those rules.¹⁷⁰ But it would seem truly bizarre if instead the court sanctioned the attorney for impugning the integrity of the executive branch by arguing that a mem-

¹⁶⁴ See *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

¹⁶⁵ See 376 U.S. at 292; *Tarkington*, *supra* note 2, at 1576–79, 1584; see also *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (explaining that “speech concerning public affairs is more than self-expression; it is the essence of self-government”) (quoting *Sullivan*, 376 U.S. at 270). See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (basing theory for need for free speech on idea of self-government).

¹⁶⁶ See *Tarkington*, *supra* note 2, at 1594–95.

¹⁶⁷ *Button*, 371 U.S. at 429.

¹⁶⁸ *Id.*

¹⁶⁹ Although the Eleventh Amendment and the various immunity doctrines may occasionally bar suits against governments and government officials, state and federal officers may nonetheless be sued in their individual capacity for monetary relief and in their official capacity for prospective injunctive relief. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1970) (allowing recovery of money damages from federal agents for violations of the Fourth Amendment); *Ex parte Young*, 209 U.S. 123, 159–60 (1908) (granting injunctive relief against state attorney general).

¹⁷⁰ See *Sullivan*, *supra* note 8, at 569; *Tarkington*, *supra* note 2, at 1569–70.

ber thereof had committed a constitutional violation. The judiciary is not immune from having members who abuse their power, are biased, incompetent, or corrupt, or whose actions deny citizens their constitutional rights.¹⁷¹ The U.S. Supreme Court recognized this fact in their 1972 decision, *Mitchum v. Foster*, where the Court interpreted 42 U.S.C. § 1983¹⁷² and explained that at the time of its enactment Congress found that “state courts were being *used to harass and injure individuals*, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.”¹⁷³

Kathleen Sullivan, while analogizing attorney speech to various kinds of governmental speech,¹⁷⁴ warns that “[i]t would plainly be untenable for the Court to treat lawyers as entirely the agents of the state, for part of their very job description within the administration of justice is to challenge the state—for example, in the capacities of criminal defense lawyer or civil rights litigator.”¹⁷⁵ Although Sullivan’s point is correct, the essential role of the attorney in challenging the state extends far beyond the examples she provides of attorneys who directly litigate against the government as an opposing party. It is not solely the job of the criminal defense lawyer or the civil rights litigator to challenge state or governmental action. Rather every appellate attorney who challenges the decision of a lower court is challenging state or federal action, but the action is judicial in nature.¹⁷⁶ Further, attorneys who seek

¹⁷¹ See, e.g., *Caperton*, 129 S. Ct. at 2257–58; see also *Impeachment Urged for Federal Judge*, N.Y. TIMES, Jan. 22, 2010, at A13 (noting impeachment proceedings against a Federal District Court judge from Louisiana).

As summarized by Professor Geoffrey P. Miller:

In jurisdictions across the country, complaints are heard about judges and magistrates who are incompetent, self-indulgent, abusive, or corrupt. These bad judges terrorize courtrooms, impair the functioning of the legal system, and undermine public confidence in the law. They should not be allowed in office, yet many retain prestigious positions even after their shortcomings are brought to light. The situation, moreover, does not appear to be under control. If recent scandals in New York and other states are a guide, incidents of judicial misconduct may be on the rise.

Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431 (2004).

¹⁷² See *Mitchum v. Foster*, 407 U.S. 225, 242–43 (1972). The Court held that 42 U.S.C. § 1983 provided an “expressly authorized” exception to the anti-injunction statute, which barred federal courts from enjoining state court proceedings. See *id.*

¹⁷³ See *id.* at 240 (emphasis added).

¹⁷⁴ See Sullivan, *supra* note 8, at 585–87.

¹⁷⁵ See *id.* at 587–88.

¹⁷⁶ See, e.g., *Velazquez*, 531 U.S. at 545 (“By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits

to have a judge disqualified or who make arguments of judicial bias or denial of due process are challenging the government, specifically the judiciary.¹⁷⁷ Judges should not be able to limit or curb the extent to which their actions can be called into question where there is a legal argument or remedy available to the affected client. It is the attorney's core function to present a client's colorable arguments and claims and the core function of the judicial system to hear these claims in court proceedings—even if such arguments implicate judicial integrity.

II. ARGUMENTS THAT ATTORNEYS LACK FREE SPEECH RIGHTS ARE UNPERSUASIVE

A. *Officers of the Court*

Despite the Court's 2001 decision in *Legal Services Corp. v. Velazquez*¹⁷⁸ and the essentiality of court proceedings in providing relief to litigants harmed by judicial abuse and bias, most courts reject the proposition that attorneys have free speech rights in court proceedings, often citing to the idea that an attorney is an "officer of the court."¹⁷⁹ When filing papers with a court, attorneys are indeed "officers of the court," meaning they are cloaked by the state with authority to represent another person in court and could not appear or file papers on another's behalf without having obtained their license. As Justice Sandra Day O'Connor stated in her concurrence in *Gentile v. State Bar of Nevada*, "[l]awyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what oth-

speech and expression upon which courts must depend for the proper exercise of the judicial power.").

¹⁷⁷ Cf. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (holding that a state provision which "prohibit[s] candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment").

¹⁷⁸ 531 U.S. 533, 548–49 (2001).

¹⁷⁹ See, e.g., *In re Shearin*, 765 A.2d 930, 938 (Del. 2000) (citing to idea that attorneys are officers of the court and "that there are ethical obligations imposed upon a Delaware lawyer, which qualify the lawyer's constitutional right to freedom of speech"); *In re Frerichs*, 238 N.W.2d 764, 769 (Iowa 1976) ("In his professional role a lawyer has a duty to the court which he serves as officer."); *In re Pyle*, 156 P.3d 1231, 1243 (Kan. 2007) ("Upon admission to the bar of this state, attorneys assume certain duties as officers of the court. Among the duties imposed upon attorneys is the duty to maintain the respect due to the courts of justice and to judicial officers.") (quoting *In re Johnson*, 729 P.2d 1175, 1179 (Kan. 1986)); *Ky. Bar Ass'n v. Waller*, 929 S.W.2d 181, 183 (Ky. 1996) ("Officers of the court are obligated to uphold the dignity of the Court of Justice . . .").

erwise might be constitutionally protected speech.”¹⁸⁰ But, as Professor Erwin Chemerinsky pointed out, labeling an attorney an “officer of the court” does not provide any guidance as to the consequences or normative meaning of that label.¹⁸¹ Does the label mean that an attorney is an instrument of the state? Does the label mean that the attorney has limited or no First Amendment rights when acting in that capacity? The label itself does not provide any framework for determining the rights of attorneys or their clients.

Scholars have generally approached the ambiguity of the term “officers of the court” by analogizing attorney speech to other categories of speech where the Free Speech Clause analysis is more developed.¹⁸² Notably, attorneys acting in their capacity as officers of the court have repeatedly been analogized to public employees.¹⁸³ Commentators have further analogized attorney speech to a form of government-funded speech¹⁸⁴ or to speech made in a non-public forum.¹⁸⁵ Nevertheless, each of these analogies fails to recognize and account for the following: (1) the nature of the court system as an essential part of our tripartite system of government that performs constitutionally required functions; (2) the constitutional rights of litigants and criminal defendants to access that system and to protections within that system (including rights to an unbiased judiciary); and (3) the attorney’s role in representing her client in that court system, particularly in light of its American adversarial form. These failures are evident in analyzing each of the three analogies both in the specific context of attorney speech critical of the judiciary as well as more generally.

1. Analogy to Government-Funded Expression

Professors Kathleen Sullivan and W. Bradley Wendel have analogized regulation of attorney speech to the regulation of government-funded speech.¹⁸⁶ The idea is that state and federal governments fund the court system and attorneys use, or are beneficiaries of, that funding and are able to speak to the court through that funding. In a sense, the

¹⁸⁰ *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1081–82 (1991) (O’Connor, J., concurring).

¹⁸¹ Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 872 (1998).

¹⁸² See *infra* notes 183–297 and accompanying text.

¹⁸³ See *infra* notes 230–278 and accompanying text.

¹⁸⁴ See *infra* notes 186–229 and accompanying text.

¹⁸⁵ See *infra* notes 279–297 and accompanying text.

¹⁸⁶ See Sullivan, *supra* note 8, at 569; Wendel, *supra* note 8, at 307.

government is “subsidizing” attorney speech by providing the court system and thus can place restrictions on the speech that is allowed. Notably, at the time that Sullivan and Wendel made their analogies, the U.S. Supreme Court’s case law in the area of government speech was arguably more protective of speech than it has become in recent years where the Court has stated that “the Free Speech Clause has no application” at all to government speech.¹⁸⁷ For example, Sullivan notes as to government-funded speech that the “government’s mere refusal to subsidize speech of particular content is constitutional, unless aimed at the suppression of a particular viewpoint.”¹⁸⁸ Similarly, Wendel argues that “it may be helpful to think of lawyers’ speech that is directly related to representing clients as a kind of government-funded expression, to which content-based restrictions may be attached.”¹⁸⁹ Both Wendel and Sullivan read the then-existing government speech cases to allow content-based, but not viewpoint-based, restrictions on speech.¹⁹⁰ In more recent cases, however, the Court has held that government speech is “exempt from First Amendment scrutiny” entirely.¹⁹¹

Moreover, since the time that Sullivan and Wendel proposed their analogies of attorney speech to government-funded speech, the Supreme Court in *Velazquez* has in large part rejected the analogy. The major argument proffered in *Velazquez* and rejected by the Court was that speech by the attorneys who received LSC funding was government speech—like the speech of the doctors receiving Title X funding at issue in the U.S. Supreme Court’s 1991 decision in *Rust v. Sullivan*.¹⁹² The Court in *Velazquez* held that even when the attorneys *are paid*

¹⁸⁷ See, e.g., *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009); see also *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (stating the issue as whether the speech “is the Government’s own speech and therefore is exempt from First Amendment scrutiny” and holding that it was) (emphasis added).

¹⁸⁸ Sullivan, *supra* note 8, at 587 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983)).

¹⁸⁹ Wendel, *supra* note 8, at 380 (citing *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995); *Rust*, 500 U.S. 173).

¹⁹⁰ Consequently, under the case law existing when they wrote their articles, punishment for impugning judicial integrity—as a viewpoint-based restriction—would be unconstitutional. See *infra* note 282.

¹⁹¹ *Johanns*, 544 U.S. at 553; see also *Summum*, 129 S. Ct. at 1125 (holding that placement of a monument is “a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause”) (emphasis added).

¹⁹² See *Velazquez*, 531 U.S. at 542–44; *Rust*, 500 U.S. at 203. Title X of the Public Health Service Act provides funding for family-planning services but expressly prohibits funding such services where abortion is a method of family planning. See 2 U.S.C. § 300a-6 (2006).

through government subsidies, the speech of the attorney is “private” rather than “government” speech because the attorney “speaks on the behalf of his or her private indigent client” rather than disseminating a specific governmental message.¹⁹³ In so holding, the Court recognized that an attorney works under rules of professional responsibility “that mandate his exercise of independent judgment on behalf of the client” and that an assumption exists “that counsel will be free of state control.”¹⁹⁴ The Court also found that the subsidies impaired the traditional judicial function by precluding attorneys from “advis[ing] the courts of serious questions of statutory validity” and thus “prohibit[ed] speech and expression upon which courts must depend for the proper exercise of the judicial power.”¹⁹⁵ Thus, the Court concluded: “The advice from the attorney to the client and *the advocacy by the attorney to the courts* cannot be classified as governmental speech even under a generous understanding of the concept.”¹⁹⁶ If “advocacy by the attorney to the courts cannot be classified as governmental speech” when that advocacy is in fact funded by the government, then the significantly broader proposition analogizing attorney speech whenever made as an officer of the court to government speech cannot hold.

The four-justice dissent in *Velazquez* argued that the restriction on attorney speech at issue in *Velazquez* was indistinguishable from that at issue in *Rust* and thus was constitutional.¹⁹⁷ In *Rust*, doctors who received Title X subsidies were forbidden from encouraging, promoting, or advocating abortion as a method of family planning or referring a pregnant woman to an abortion provider even if the woman requested as much.¹⁹⁸ The *Rust* Court upheld the restriction, stating:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has *merely chosen to fund one activity to the exclusion of the other*.¹⁹⁹

¹⁹³ See *Velazquez*, 531 U.S. at 542.

¹⁹⁴ *Id.* (quoting *Polk County v. Dodson*, 454 U.S. 312, 321–22 (1981)).

¹⁹⁵ *Id.* at 545.

¹⁹⁶ *Id.* at 542–43 (emphasis added).

¹⁹⁷ *Id.* at 558–59 (Scalia, J., dissenting).

¹⁹⁸ *Rust*, 500 U.S. at 179–81.

¹⁹⁹ *Id.* at 193 (emphasis added).

The *Velazquez* dissent contended that “[i]t is hard to see how providing free legal services to some welfare claimants (those whose claims do not challenge the applicable statutes) while not providing it to others is beyond the range of legitimate legislative choice.”²⁰⁰

Despite the dissent’s argument, there are substantial differences between the attorney speech in *Velazquez* and the speech at issue in *Rust*. As the *Rust* majority noted, Title X projects were limited in scope and did not provide for post-conception medical care. The Court therefore held that the program was not “sufficiently all encompassing as to justify an expectation on the part of the patient of comprehensive medical advice.”²⁰¹ Thus, a doctor in a Title X project was “free to make clear that advice regarding abortion is simply beyond the scope of the program.”²⁰² In contrast, in *Velazquez*, the attorney represented his or her clients in a regular manner: if it appeared that the client’s case included a challenge to the validity of welfare laws, the attorney was required to withdraw from the representation.²⁰³ Thus, unlike the doctors in *Rust*, the lawyers in *Velazquez* could not offer their clients any help at all if the case included a possible challenge to a welfare law.²⁰⁴ Further, if the lawyer closed his eyes to any validity challenge and litigated the case without raising such a challenge, the client could not later receive that aid through another attorney without running into problems of preclusion—as claims not brought are lost.²⁰⁵ As the majority in *Velazquez* stressed, the problem was not just the failure to advise the client, but the failure to advise the courts of constitutional and other challenges to state and federal welfare laws.²⁰⁶ Thus in *Rust*, the sole recipient of the speech would be the patient, who could not receive post-conception medical care from the Title X project anyway;²⁰⁷ whereas in *Velazquez*, the recipient of the speech was not solely the client, but also the courts.²⁰⁸ The *Velazquez* majority clearly saw the congressional restriction on challenges to welfare laws as an attempt to sig-

²⁰⁰ *Velazquez*, 531 U.S. at 557 (Scalia, J., dissenting); *accord id.* at 562 (“The only difference between *Rust* and the present cases is that the former involved ‘distortion’ of (that is to say refusal to subsidize) the normal work of doctors, and the latter involves ‘distortion’ of (that is to say, refusal to subsidize) the normal work of lawyers.”).

²⁰¹ *Rust*, 500 U.S. at 200.

²⁰² *Id.*

²⁰³ *See Velazquez*, 531 U.S. at 548.

²⁰⁴ *See id.*

²⁰⁵ *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998).

²⁰⁶ *See Velazquez*, 531 U.S. at 546.

²⁰⁷ *See Rust*, 500 U.S. at 200.

²⁰⁸ *See Velazquez*, 531 U.S. at 546.

nificantly thwart the judicial role and separation of powers by insulating the legislature's welfare laws from judicial scrutiny.²⁰⁹

Even assuming that the *Velazquez* Court's distinguishing of *Rust* was unpersuasive (and that *Rust* was correctly decided), the analogy of attorney speech whenever made as officer of the court to government-funded speech is a far more tenuous proposition than recognizing the restrictions in either *Rust* or *Velazquez* as government speech. The analogy applies to all attorneys who use the state or federal court systems—even if the attorney is paid entirely by private clients. The analogy (and the attendant loss of free speech rights) is not applicable solely to attorneys who accept LSC funding. Rather, the theory is that all attorneys when acting in their official capacities as officers of the court—which would include filing papers with a court—are participating in a sort of government-funded expression, and could be subject to the types of restrictions upheld in the other government speech cases.²¹⁰

The analogy of attorney speech to government-funded speech, even before *Velazquez*, is thus unworkable. In several of the government speech cases, the Court noted the option of an alternative speech forum.²¹¹ For example, in *Rust*, the Court noted that doctors can decline Title X funding and fund their own clinic.²¹² Moreover, even if they accept the subsidy, doctors working in a Title X project “can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy,” but they must “conduct those activities through programs that are separate and independent from the project that receives Title X funds.”²¹³ Neither is true for attorneys in bringing their clients' claims in a court. Even though the court itself is funded by the government, and is thus a “subsidy” for attorneys practicing law, the attorney cannot opt out of the court system and litigate her client's claims elsewhere. For example, an attorney representing a criminal defendant who wants to make an argument that her client was denied due process because of a biased judge cannot choose to “decline” to accept

²⁰⁹ See *id.*

²¹⁰ See Sullivan, *supra* note 8, at 569; Wendel, *supra* note 8, at 307.

²¹¹ See *Rust*, 500 U.S. at 199 n.5 (explaining that doctors receiving Title X funds remain free to use non-Title X money to finance abortion-related activities); *League of Women Voters*, 468 U.S. at 400 (explaining that “[o]f course, if Congress” adopted a restriction that would allow broadcasters to engage in the prohibited speech when using non-federal funds, “such a statutory mechanism would plainly be valid”); *Regan*, 461 U.S. at 540.

²¹² See *Rust*, 500 U.S. at 199 n.5 (explaining that recipients are “in no way compelled to operate a Title X project; to avoid the force of the regulations [they] can decline the subsidy” and can “finance[e] their own unsubsidized program”).

²¹³ *Id.* at 196.

the criminal justice system, choose to fund her own court system, and somehow obtain relief for her client in some other way.²¹⁴ The only place to make the argument and obtain relief for her client is in the court system where the state brought the criminal charges. No alternate forum is available that can provide any relief to the client.

The same is true in civil litigation. If a client has civil claims brought on his behalf or against him in a court of law, the attorney cannot obtain relief for her client by making the argument in some other forum, or outside of court when *not* acting as an officer of the court. The only place to assert the client's legal rights is through the ongoing court proceeding. Thus, as noted above, the officer of the court analogy fails to account for the fact that the court system performs an essential role of our government that cannot be fulfilled in some other place or way.

Further, as noted in the government speech cases, including *Velazquez*, part of the justification for the government speech doctrine is that "when the government speaks, for instance to *promote its own policies* or to advance a particular idea, it is, in the end, *accountable to the electorate and the political process* for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."²¹⁵ As applied in the scenario of speech critical of the judiciary, as I have argued elsewhere, restrictions forbidding attorneys from impugning judicial integrity in fact keep the electorate in the dark, obscuring political accountability.²¹⁶ Even more narrowly in the context of court filings, particularly when made on behalf of individual private clients, the government is not promoting its own legitimate policies through the speech of the attorney and neither the attorney nor the court is politically accountable to the electorate for the attorney's speech. Indeed, the opposite is true. By punishing the speech of attorneys, the judiciary is promoting its own reputation, an interest that the

²¹⁴ On the other hand, a doctor could decline Title X funds and fund his own clinic. See *Rust*, 500 U.S. at 199 n.5.

²¹⁵ *Velazquez*, 531 U.S. at 541 (quoting Bd. of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 235 (2000)); see *Summum*, 129 S. Ct. at 1138–39 (Stevens, J., concurring) ("Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, *that the government will be able to avoid political accountability for the views that it endorses or expresses through this means.*") (emphasis added); *Johanns*, 544 U.S. at 563 (explaining that "[s]ome of our cases have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability," and finding that sufficient accountability existed).

²¹⁶ See Tarkington, *supra* note 2, at 1600–05.

judiciary cannot promote by punishing speech outside of the requirements of *Sullivan*.²¹⁷

Finally, attorney speech made as an “officer of the court” is, at its core, different from the other government-funded speech cases. In other government speech cases, the government decided as a matter of political policy to fund something that it was not required to fund at all. The government was not required to provide tax deductions for donations to charitable organizations, as in *Regan v. Taxation with Representation of Washington*,²¹⁸ was not required to provide Title X funding as in *Rust*,²¹⁹ was not required to create an arts endowment foundation, as in *National Endowment for the Arts v. Finley*,²²⁰ and was not required to pay the publishing costs for independent student publications, as in *Rosenberger v. Rector & Visitors of the University of Virginia*.²²¹ In like manner, the government was not required to promote beef consumption, as in *Johanns v. Livestock Marketing Ass’n*,²²² and was not required to install donated permanent monuments in public parks, as in *Pleasant Grove City v. Summum*.²²³ Indeed, the government was not even required to provide LSC funding for legal representation of civil cases as in *Velazquez*.²²⁴ In each of these cases, the government decided to expend money for a project that it had no obligation to fund, and, in turn, imposed conditions or restrictions on the receipt or use of the government funds.

In stark contrast, state and federal governments are constitutionally required to provide access to courts and, thus, to have and to fund court systems. State and federal court systems as a whole are not created and abolished on governmental whims or certain political platforms and policies (like beef promotion, Title X funding, and park monuments), but are an essential component of our tripartite system of government and a component to which people have a right of access. Even for the lower federal courts, created by Congress under Article III, commentators have generally concluded that if their jurisdiction (or existence) were limited to such an extent that litigants were denied all judicial review, particularly for constitutional claims, it would comprise

²¹⁷ See *id.* at 1593–1609. Although the judiciary may claim to be preserving public confidence in the judiciary or preserving the public’s respect for courts, these are just alternative ways of saying judicial reputation. See *id.* at 1630–31.

²¹⁸ Cf. 461 U.S. at 544.

²¹⁹ Cf. 500 U.S. at 173.

²²⁰ Cf. 524 U.S. at 573.

²²¹ Cf. 515 U.S. at 822.

²²² Cf. 544 U.S. at 553.

²²³ Cf. 129 S. Ct. at 1129.

²²⁴ See 531 U.S. at 536.

a denial of due process.²²⁵ The Constitution contains several guarantees regarding court access, as discussed above, and court procedure—including rights to a jury trial and general due process for criminal and civil cases, and specific procedural requirements for criminal proceedings, including a right to be indicted, a right to a public trial, a right to an attorney, a right to confront witnesses, a right against double-jeopardy, and a right against self incrimination.²²⁶ Thus the government “funding” or “subsidizing” of a court system is not something that government can conditionally offer to attorneys and clients in like manner to regulations and conditions upheld in cases regarding government speech or spending powers. Rather it is a core part of our form of government, complete with constitutionally created rights for those who use it and, in turn, for the attorneys who represent them.

The analogy of attorney speech to government speech, particularly as to speech impugning judicial integrity, also fails to account for the role of the attorney in the adversarial system and the attorney-client relationship. The adversarial system would be frustrated if the government could select the viewpoints and content of allowable speech that it wanted to be presented in courts and disallow others. Again, the government is free to promote some messages with its own speech (like, “Beef. It’s What’s for Dinner”²²⁷), but it cannot promote one side’s message by prohibiting another’s in the court system. The idea of the adversary system is that both sides of an issue will be heard, which cannot be accomplished where one viewpoint is selectively punished.²²⁸ Finally,

²²⁵ See, e.g., ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 206 (5th ed. 2007) (“There is a strong argument that due process would be violated if the effect of the jurisdictional restriction is that no court, state or federal, could hear a constitutional claim.”).

²²⁶ See U.S. CONST. amends. V, VI, VII, XIV. The specific procedural requirements for criminal proceedings include a right not to be charged with a serious crime unless indicted, a right to a public trial, a right to an attorney, a right to confront witnesses, a right against double-jeopardy, and a right against self incrimination. *Id.* amends. V, VI. The procedural guarantees for civil litigants include, at the most basic level, notice and an opportunity to be heard. See Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL’Y REV. 1, 8–14 (2006).

²²⁷ See *Johanns*, 544 U.S. at 554.

²²⁸ As the Fourth Circuit has expounded:

Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system’s process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition.

as noted above, treating attorney speech as government speech fails to recognize that attorneys are employed to protect and advocate the rights of their clients. Court proceedings do not exist so that attorneys can praise judges or promote any particular government message; rather, court proceedings exist and attorneys freely represent clients to promote and protect individual life, liberty, or property. Thus, as discussed above, it is essential that attorneys have a speech right sufficient to protect and vindicate the rights of their clients. As the *Velazquez* Court recognized, attorneys must be free to “exercise . . . independent judgment on behalf of the client” and be “free of state control” in making relevant and colorable arguments to a court.²²⁹

2. Analogy to Public Employees

A number of commentators, including Wendel and Sullivan, have analogized attorney speech to restrictions on the speech of government employees.²³⁰ Most recently, Professor Terri Day proffered an analogy between “attorneys as ‘officers of the court’ and public employees,” relying on the U.S. Supreme Court’s 2006 decision in *Garcetti v. Ceballos* to contend that attorneys should be protected “against discipline for all out-of-court speech about non-pending matters.”²³¹ Of course, the corollary to Day’s analogy is that, as in *Garcetti*, an attorney loses her free speech rights when speaking as an officer of the court. Indeed, Day states: “A lawyer’s First Amendment rights *may be denied* when he or she speaks in a courtroom as an officer of the court,”²³² including, apparently, when attorney speech is made in a court filing or even in regards to a pending case.²³³

Prior to *Garcetti*, and at the time that Wendel and Sullivan made their analogies, the public employee cases, beginning with the U.S. Su-

United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993).

²²⁹ 531 U.S. at 542 (quoting *Dodson*, 454 U.S. at 321–22).

²³⁰ See, e.g., Day, *supra* note 8, at 187–90 (“Although all attorneys are not public employees, there are some similarities between attorneys as ‘officers of the court’ and public employees.”); Sullivan, *supra* note 8, at 586–87; Wendel, *supra* note 8, at 375–76; Roberts, *supra* note 35, at 846–54; see also Comm. on Legal Ethics of the W. Va. State Bar v. Douglas, 370 S.E.2d 325, 331–32 (W. Va. 1988) (discussing “analogy” to public employee speech cases, including *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Bd. of Educ.*, 391 U.S. 564 (1968), and explaining that “[w]hile it is true that a lawyer’s relationship to the court system is not that of employer-employee, there are through tradition and the Code of Professional Responsibility bonds which may be likened to such a relationship”).

²³¹ Day, *supra* note 8, at 187–88; see *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

²³² Day, *supra* note 8, at 187 (emphasis added).

²³³ *Id.* at 180, 188–89.

preme Court's 1968 decision *Pickering v. Board of Education*, offered a somewhat appealing analogy for analyzing attorney speech cases.²³⁴ In *Pickering*, the Supreme Court rejected "the theory that public employment, which may be denied altogether, may be subjected to any conditions, regardless of how unreasonable" and created a formula for examining the free speech rights of public employees.²³⁵ Specifically the *Pickering* Court held:

The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.²³⁶

The *Pickering* test evolved over time, but the basic test (until *Garcetti*) remained the same: balancing the speech interests of the employee to comment on issues of public concern with the government's "interest in achieving its goals as effectively and efficiently as possible."²³⁷

Thus, at its most basic level, the *Pickering* framework involved a recognition and examination of both the free speech interests of the speaker as well as the interests of the government in efficient administration.²³⁸ An attorney version of the *Pickering* test might be articulated thus: balancing (1) the interests in the right of the attorney to speak on matters of public concern and vindicate the legal rights and interests of her client and, as recognized in latter formulations of the *Pickering* test, the interests of recipients in that speech, on the one hand, with (2) the interest of the judiciary in the effective, efficient, and fair administration of justice, on the other hand.²³⁹ Applied in the context of speech made in court filings, such a test would at the very least acknowledge the existence of interests on both sides and require the government to assert an interest that justified restrictions on speech and was intended to promote effective and efficient operation of the court system. Restrictions of attorney speech based on relevance, timeliness, or page limitations, for example, would easily pass muster under such a test, as they are all neutral restrictions on speech that are essential to the effective, efficient, and fair administration of justice.

²³⁴ See *Pickering*, 391 U.S. at 568.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Waters v. Churchill*, 511 U.S. 661, 675 (1994).

²³⁸ See 391 U.S. at 588.

²³⁹ See *id.*

Post-*Garcetti*, however, and as proposed by Day, the public employee analogy to attorney speech is unpersuasive. In *Garcetti*, the Supreme Court held that as a threshold matter, the *Pickering* balancing test only applied where the public employee was speaking as a citizen, but does not apply at all where “public employees make statements pursuant to their official duties.”²⁴⁰ The Court held in essence that a public employee has no First Amendment rights at all whenever speech is made pursuant to an official duty, and “the Constitution does not insulate [such] communications from employer discipline.”²⁴¹ Indeed, the Court borrowed its new rule from the government speech cases and held that where public employee speech is made pursuant to a public employee’s official duties, the public employee has no free speech rights at all.²⁴²

Unfortunately, *Garcetti* involved the speech of an attorney who also happened to be a publicly employed prosecutor.²⁴³ Indeed, the most troubling aspect of *Garcetti* is, as noted by the dissenting justices, that the speech involved was made by Richard Ceballos, a deputy district attorney in Los Angeles County, in order to fulfill what he believed was required of him by both the Constitution and rules of professional conduct.²⁴⁴ After examining the crime scene and speaking with the affiant, who was a Los Angeles County deputy sheriff, Ceballos came to believe that the deputy sheriff’s affidavit, which was used to obtain a critical search warrant, contained serious misrepresentations.²⁴⁵ Ceballos wrote a memo to his supervisor expressing his concerns that government misconduct had occurred and recommending dismissal of the case.²⁴⁶ As noted in Justice Breyer’s dissent, Ceballos believed the speech contained in the memo “fell within the scope of his obligations under *Brady v. Maryland*” and its progeny “to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment

²⁴⁰ *Garcetti*, 547 U.S. at 421 (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).

²⁴¹ *Id.*

²⁴² See *id.* at 422 (citing *Rosenberger*, 515 U.S. at 833, as support for its denial of First Amendment rights); see also *Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring) (including the *Garcetti* decision as one of “the recently minted government speech” cases along with *Johanns*, both of which he believes are “of doubtful merit”).

²⁴³ 547 U.S. at 413.

²⁴⁴ *Id.* at 430–31 (Souter, J., dissenting).

²⁴⁵ *Id.* at 413–15 (majority opinion).

²⁴⁶ *Id.*

evidence.”²⁴⁷ The MRPC contain similar requirements for prosecutors.²⁴⁸ Indeed, after writing the memo and unsuccessfully advocating the dismissal of the case to his supervisors, Ceballos gave the memo outlining the inaccuracies of the warrant (“with his own conclusions redacted as work product”) to the defense as exculpatory evidence, and testified regarding his observations at the suppression hearing.²⁴⁹ Ceballos subsequently was subject to adverse employment actions, including reassignment, transfer, and denial of a promotion.²⁵⁰

Ceballos’s communication was made to secure the constitutional rights of a criminal defendant, to fulfill his professional responsibility requirements as a prosecutor, and to expose potential government misconduct. Despite these facts, the U.S. Supreme Court characterized Ceballos’s speech, as contained in the memo as “government speech” for which Ceballos could be disciplined by his employer without any recourse to or rights under the Free Speech Clause.²⁵¹

Post-*Garcetti*, and under Day’s thesis, the analogy of attorney speech to public employee speech denotes that attorneys, when performing their official duties, have no free speech rights and can be freely punished for their speech by the court of which the attorney is an officer.²⁵² Thus, judges and the state bar could punish speech that occurs when the attorney is performing her official duties—even if the attorney is attempting to expose government misconduct or to secure the constitutional rights of a litigant (as was Ceballos, whose speech was intended to secure the constitutional rights of a criminal defendant).²⁵³

To the extent that the analogy is accepted, the determinative question becomes the scope of an attorney’s official duties as an officer of the court as to which the attorney has no free speech rights. Day only states what would certainly *not* be included in an attorney’s official duties: “out-of-court speech about non-pending matters.”²⁵⁴ The definition is unhelpful because the inverse is vast: attorneys potentially would have no speech rights for in-court speech or out-of-court speech about pending matters. In *Garcetti*, the scope of what the Court considered to be within Ceballos’s official duties and thus exempt from free speech

²⁴⁷ *Id.* at 446–47 (Breyer, J., dissenting).

²⁴⁸ See MODEL RULES OF PROF’L CONDUCT R. 3.8(b) (2009).

²⁴⁹ See *Garcetti*, 547 U.S. at 442 (Stevens, J., dissenting).

²⁵⁰ See *id.* at 415.

²⁵¹ See *id.* at 421. Ceballos’s other communications, including his testimony at the suppression hearing, were not at issue before the Supreme Court. *Id.* at 415.

²⁵² See Day, *supra* note 8, at 164.

²⁵³ See *Garcetti*, 547 U.S. at 414–15.

²⁵⁴ Day, *supra* note 8, at 188.

scrutiny is strikingly broad—pretty much anything that fell within his “daily professional activities,” whether or not it was specifically requested by the employer or produced on the employee’s own initiative.²⁵⁵ The Court stated:

Ceballos did not act as a citizen when he went about conducting his daily *professional* activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the *proper* disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.²⁵⁶

By analogy, the scope of an attorney’s speech that would be considered part of her official duties by virtue of being an “officer of the court” could be viewed very broadly as including any speech that the attorney was able to make by virtue of being licensed by the state. This broad view could include advising clients even in non-pending matters because a lay person is prohibited from providing specific legal advice under unauthorized practice of law rules.²⁵⁷ But even under a narrow construction, attorney speech made as an officer of the court certainly would include in-court speech, speech contained in court filings, and speech made pursuant to an attorney’s official capacity in a pending proceeding, such as in depositions or conferences.

Importantly, if this analogy were accepted, it would fail to adequately protect the underlying rights of clients. The reason that a free speech right for attorneys is necessary is to allow attorneys full expressive ability to protect and vindicate their clients’ rights.²⁵⁸ As the facts of *Garcetti* demonstrate, public employees can be punished for their speech even when they are vindicating the constitutional rights of litigants (as was Ceballos).²⁵⁹ The problem expands depending on how broadly one interprets the scope of an attorney’s official duties.

But even in its most narrow form, and even pre-*Garcetti*, the analogy between attorney and public employee speech is flawed. Both at-

²⁵⁵ *Garcetti*, 547 U.S. at 422. Indeed, the memo that Ceballos wrote was written on Ceballos’s own initiative, yet the Court specifically included the memo in its list of “official duties” because it “addressed the proper disposition of a pending criminal case.” *Id.*

²⁵⁶ *Id.* (emphasis added).

²⁵⁷ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 (2000) (“A person not admitted to practice as a lawyer . . . may not engage in the unauthorized practice of law . . .”).

²⁵⁸ See *supra* notes 54–62 and accompanying text.

²⁵⁹ See *Garcetti*, 547 U.S. at 424.

torneys and public employees were once seen in a similar light as having virtually no rights to their licenses or positions, respectively. This was because both membership in the bar and public employment were seen as “privileges” as opposed to “rights.”²⁶⁰ As noted above, in the public employment context, the Supreme Court in *Pickering* departed from this model and held that public employees retain some rights—even though they do not have a right to the employment itself.²⁶¹ The evolution for attorneys was different in significant ways. Notably, unlike public employees, attorneys who meet the requisite admission requirements have a right to receive a license to practice law.²⁶² In the U.S. Supreme Court’s 1971 plurality decision, *Baird v. State Bar of Arizona*, Justice Black declared: “[t]he practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character.”²⁶³ There is no accident in the divergence. Qualified individuals who comply with licensing requirements are entitled to admission to a state bar, and the state can admit all of them. Despite its wishes, however, a state cannot hire all qualified applicants that apply for a specific government job. Moreover, rejection of a license to practice is significantly different from rejection of employment for a specific job. If a person does not get (or is fired from) a government job, she can generally get a different job in the private sector or apply for a different government job. If a state refuses to admit an applicant into the state bar, however, or suspends or disbars that person, the entire vocation of law practice is foreclosed to her in the public and private sector. The attorney loses her vocation—not just her job—and is stripped of the ability to practice law anywhere.

Unlike the development of the *Pickering* analysis for public employee speech, post-*Baird* the cases regarding attorney regulation have *not* adopted a special analysis that can be applied to test the constitutionality of restrictions on attorney speech. For example, in challenges

²⁶⁰ As explained in *Connick v. Myers*, “[f]or most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.” 461 U.S. 138, 143 (1983). The traditional rule regarding public employees was explained by what has been termed a “Holmes’ epigram”: “A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *See id.* at 143–44.

In similar terms, Judge Cardozo famously articulated the same idea as to attorneys: “Membership in the bar is a privilege burdened with conditions.” *In re Rouss*, 221 N.Y. 81, 84 (1917).

²⁶¹ *See* 391 U.S. at 574.

²⁶² *See Baird v. State Bar of Ariz.*, 401 U.S. 1, 8 (1971).

²⁶³ *Id.*

to regulations on attorney advertising, the Supreme Court has analyzed regulation of attorney speech through the same methodology that it uses for restrictions on any other regulated industry. The U.S. Supreme Court employs the commercial speech test, established in 1980 in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,²⁶⁴ with no special modifications based on the fact that the regulation is on attorney speech.²⁶⁵ Of course, the interests asserted by the government may be keyed to issues specific to attorneys, but the level of scrutiny and the constitutional analysis is the same as that used for restricting the speech of other regulated industries. Similarly, in its 2002 decision, *Republican Party of Minnesota v. White*, the U.S. Supreme Court applied strict scrutiny to declare unconstitutional a state law forbidding attorneys, and judges running for judicial office from expressing their views on certain political issues.²⁶⁶ Again, although the interests asserted by the state were context-specific to attorneys, the test applied was the traditional test for restrictions on political speech—strict scrutiny.²⁶⁷ Indeed, in the U.S. Supreme Court's 1963 decision in *NAACP v. Button*, the court reaffirmed in the context of a regulation on attorney speech that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms" and thus "it is no answer to the constitutional claims . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression."²⁶⁸ Thus, in contrast to public employee speech, restrictions on attorney speech have generally been treated in the same manner as a restriction on any other regulated profession.

Further, the rationale underlying *Garcetti* is:

Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are ac-

²⁶⁴ 447 U.S. 557, 566 (1980).

²⁶⁵ See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 637–44 (1985); *In re R.M.J.*, 455 U.S. 191, 203–06 (1982); *Bates*, 433 U.S. at 365.

²⁶⁶ See 536 U.S. 765, 788 (2002).

²⁶⁷ See *id.*

²⁶⁸ 371 U.S. at 438–39.

curate, demonstrate sound judgment and promote the employer's mission.²⁶⁹

The *Garcetti* Court also discussed the need for "exercise of employer control over what the *employer itself has commissioned or created*"²⁷⁰ and explained that when the government uses its funds (to pay employees) "to promote *a particular policy of its own* it is entitled to say what it wishes."²⁷¹

In contrast, attorneys are not licensed by the state in order to promote a particular policy of the government. Under our adversary system, in any given case, there are at least two different positions or messages that are presented to the court and are largely controlled by the attorneys in the case. As recognized in *Velazquez*, it is assumed that attorneys "will be free of state control"²⁷² because "[a]n informed independent judiciary presumes an informed independent bar."²⁷³ The judiciary relies on attorneys to present arguments to it; the judiciary does not promote its own message or policies and has no control over what cases are brought before it or what arguments attorneys will make or fail to make.²⁷⁴ The situation is entirely different from public employment—even the public employment of attorneys (where a prosecutor's office, for example, can decide what cases to pursue as a matter of policy). Further, the judiciary, unlike the public employer, does not "commission or create" the attorney's work submitted to it. Even when a court requests briefing on an issue, the arguments, the message, the theories, and the facts discussed are all left up to the attorneys. The expectation is that there will be multiple and opposing messages produced from the court's request. The judiciary does not determine the specific message that is presented to it or ensure that only one point of view is presented or prevails.

In the context of speech critical of the judiciary, it is important that the judiciary not be able to control the message that is submitted to the court by discouraging or sanctioning attorneys for relevant arguments that may be read to impugn judicial integrity. The judiciary's role in so doing is sheer viewpoint discrimination and is aimed at insulating judicial conduct from scrutiny and protecting judicial reputation.

²⁶⁹ *Garcetti*, 547 U.S. at 422–23.

²⁷⁰ *Id.* at 411 (emphasis added).

²⁷¹ *Id.* at 422 (quoting *Rosenberger* 515 U.S. at 833) (emphasis added).

²⁷² 531 U.S. at 542 (quoting *Dodson*, 452 U.S. at 321–22).

²⁷³ *Id.* at 545.

²⁷⁴ *See id.*

The judiciary can only protect itself constitutionally under *Sullivan*'s subjective standard.²⁷⁵

Of course for publicly employed attorneys, *Garcetti* is not an analogy, but a flawed reality to the extent that the punishment comes from their employer. There is no indication in *Garcetti* that *Velazquez* is being overturned or being called into question.²⁷⁶ The issues in the two cases are distinct. One involves punishment from one's employer,²⁷⁷ and the other involves the free speech right of attorneys and their clients to raise relevant claims and arguments in the courts.²⁷⁸ Thus, under the rationale of *Garcetti* and *Velazquez*, although a publicly employed attorney could be demoted by his employer for filing a claim on behalf of his client, the same publicly employed attorney should not be sanctioned by a court for filing that same claim if the claim is colorable—even if the claim implicates judicial integrity.

3. Analogy to a Non-Public Forum

Wendel and Sullivan also analogize attorney speech to the U.S. Supreme Court's public and non-public forum cases.²⁷⁹ Indeed, Wendel concludes his article by stating that attorneys' "expressive rights may be restricted to further goals related to the judicial system, consistent with the Court's non-public forum doctrine. Thus lawyers' speech in trials, depositions, formal and informal pretrial proceedings (such as letters to other lawyers), and court filings may be subject to reasonable regulations."²⁸⁰ Wendel argues that this "domain of non-public forums, in which lawyers' speech is subject to extensive regulation, should be understood as limited to communications which are essential to the accomplishment of core court business, such as resolving disputes."²⁸¹

Both Wendel and Sullivan recognize that under the Supreme Court's non-public forum cases, regulations on speech are permissible as long as they are reasonable and viewpoint-neutral.²⁸² Such a rule is arguably more workable than the government speech and public em-

²⁷⁵ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

²⁷⁶ See *Garcetti*, 547 U.S. at 437.

²⁷⁷ See *id.* at 413–15.

²⁷⁸ See *Velazquez*, 531 U.S. at 536–37.

²⁷⁹ See *Sullivan*, *supra* note 8, at 585–86; Wendel, *supra* note 8, at 381, 443–44.

²⁸⁰ Wendel, *supra* note 8, at 443–44.

²⁸¹ *Id.* at 382.

²⁸² *Sullivan*, *supra* note 8, at 586 (explaining that in a non-public forum the "government may condition access as selectively as it likes so long as it acts reasonably and avoids discrimination on the basis of viewpoint"); Wendel, *supra* note 8, at 381 (explaining that non-public forums are "subject to reasonable viewpoint-neutral regulations").

ployee speech analogies, particularly post-*Summum* and post-*Garcetti*, which would leave attorneys representing clients without any speech rights at all. In the context of speech critical of the judiciary, the ultimate rule from the non-public forum analogy may work fairly well and would prohibit courts from imposing viewpoint-based restrictions, such as those punishing attorneys for impugning judicial integrity.²⁸³ Overall, however, the analogy of state and federal court systems to non-public forums is ill-fitted and flawed.

The state and federal court systems are not a “forum” susceptible to traditional forum analysis even though speech is involved and the speech takes place on government-owned property. Rather, the court systems exist as a constitutionally required function of our tripartite system of government, to which litigants have a right of access. It would certainly seem absurd to argue that Congress (another branch of our tripartite system of government performing constitutionally required functions) was a “non-public forum” where content-based restrictions on speech (such as legislation introduced, hearings, floor debates, or lobbying) were appropriate and where restrictions on speech need only be “reasonable” in light of the purpose of the forum in order to be upheld. Indeed, in the U.S. Supreme Court’s 1985 decision in *Cornelius v. NAACP*, the Court stated that, although inappropriate for a public forum, a justification as vague and weak as “avoidance of controversy” is a reasonable and valid ground for restricting speech in a non-public forum.²⁸⁴ For both Congress and the judiciary, it would be implausible to contend that content-based restrictions on speech—aimed at avoiding controversies, like forbidding discussion of abortion or same-sex marriage—were consistent with the fulfillment of the constitutional role of either branch of government. Indeed, in the judicial context, the Supreme Court has declared unconstitutional state court attempts to avoid adjudicating federal law and constitutional claims, even though

²⁸³ If the judiciary punishes speech made in court filings because the attorney has not complied with FRCP 11 or MRPC 3.1, which require the attorney to have a basis in fact or law to make the argument, and if the judiciary applies that rule as it would to any other factual or legal assertion and with no harsher punishment, then the restriction is viewpoint neutral and is a reasonable restriction consistent with the purpose of the forum—namely to resolve disputes in a manner that is reasonably grounded in fact and law. However, if the judiciary punishes the attorney for impugning judicial integrity (most likely under MRPC 8.2) and requires the attorney to make a greater factual and/or legal showing than would be required for other factual or legal assertions in support of a claim, then the punishment is viewpoint-based. That is, the attorney is being punished because he expressed a viewpoint that the judiciary finds offensive—namely that a member of the judiciary is corrupt or biased, or has abused her power.

²⁸⁴ 473 U.S. 788, 811 (1985).

the restrictions are arguably content-based, rather than viewpoint-based.²⁸⁵

Further, under the Supreme Court's non-public forum caselaw, the justifications for restrictions need not be significant or compelling (they need only be reasonable and need not be the "most reasonable"),²⁸⁶ the government is not required to demonstrate the actual existence of the alleged harms sought to be avoided,²⁸⁷ and there is no requirement of narrow tailoring for the restriction²⁸⁸ or incompatibility of the prohibited speech with the purpose of the forum.²⁸⁹ Thus, the restrictions on speech in a non-public forum end up looking akin to rationale basis review. Most assuredly, constitutional guarantees of court access and due process (which cannot be preserved without "speech" by attorneys on behalf of clients) cannot be secured if they are allowed to be restricted on such a weak basis.²⁹⁰

The rationale behind the relatively low-level review for speech restrictions in non-public forums does not fit with the idea of the fulfillment of the constitutionally required functions of our court systems. For example, in the non-public forum speech cases, the Court has noted that speakers generally have access to alternative channels of communication because "[r]arely will a non-public forum provide the only means of contact with a particular audience."²⁹¹ As noted below, the court systems offer the sole means for invoking the constitutional right to have the judiciary resolve controversies between private parties and for criminal defendants to assert their rights. There is no adequate alternative forum, and there is no other means to contact the judicial "audience" in a manner that will preserve a litigant's legal rights.²⁹²

²⁸⁵ See, e.g., *Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding that Rhode Island could not refuse to enforce claims under the federal Emergency Price Control Act); *Mondou v. N.Y. New Haven & Hartford R.R. Co.*, 223 U.S. 1, 59 (1912) (holding that Connecticut courts could not refuse to hear cases arising under the Federal Employees Liability Act).

²⁸⁶ *Cornelius*, 473 U.S. at 808 (noting that in light of "the nature of a nonpublic forum," a decision "to restrict access . . . need only be reasonable; it need not be the most reasonable or the only reasonable limitation") (emphasis omitted).

²⁸⁷ *Id.* at 810 (explaining that "lack of conclusive proof" of the alleged harm was not problematic because "the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum").

²⁸⁸ *Id.* at 809 ("Nor is there a requirement that the restriction be narrowly tailored . . .").

²⁸⁹ *Id.* at 808 ("In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is *not* mandated.") (emphasis added).

²⁹⁰ See Chemerinsky, *supra* note 181, at 887.

²⁹¹ *Id.* at 809.

²⁹² See *infra* notes 298–309 and accompanying text.

Moreover, the Court has noted that in non-public forums, unlike public forums, “the principal function of the property would be disrupted by expressive activity.”²⁹³ Yet the principal function of courts is fulfilled entirely through expressive activity; specifically, the expressive activity of attorneys making arguments and asserting claims on behalf of clients. As the Court has explained, “forum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker.”²⁹⁴ If the access sought is that of attorneys making arguments in court proceedings, that expressive activity cannot be said to disrupt the principal function of the court system, but indeed is necessary to its proper functioning.

In fact, to the extent that one attempts to fit the court system into “forum analysis,” there are several ways in which the court systems are more akin to a traditional public forum than to either a limited or non-public forum.²⁹⁵ As Hyde Park and street corners are the traditional forums to unofficially express grievances or advocate social change, the courts are not only a traditional place, but *the* “forum” given the constitutional function of providing a method to vindicate legal rights and obtain relief for private and governmental grievances.²⁹⁶ Access to courts and due process are *constitutionally guaranteed*—thus, there is a stronger right to allow adjudicative speech by attorneys and clients in courts than there is to allow protesters in parks and streets.²⁹⁷ Public parks are not a branch of our government, access to which is defined and required by the Constitution. As with public forums, narrowly tai-

²⁹³ *Cornelius*, 473 U.S. at 804.

²⁹⁴ *Id.* at 801; *see also* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 39–40 (1983) (competing unions sought access to the school system’s internal mail system); *Widmar v. Vincent*, 454 U.S. 263, 280–81 (1981) (competing student groups sought access to university funding—Court did not create access for all expressive activity by anyone, but equal access for student groups).

²⁹⁵ *See Velazquez*, 531 U.S. at 543–44 (analogizing the restrictions on speech in a court system to its “limited forum” cases). The case law regarding limited forums, however, is not entirely clear. Prior to *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), to the extent limited forums were open to speech, the forums had the same basic rules as public forums. *See Perry*, 460 U.S. at 45–46 (stating that a limited forum “is bound by the same standards as apply in a traditional public forum”). Conversely, in *Good News Club* the Court determined that the forum was limited, but then adopted the rules for a non-public forum. *See* 533 U.S. at 106.

²⁹⁶ *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939) (plurality opinion) (“[T]hey [parks and streets] have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

²⁹⁷ *See Chemerinsky*, *supra* note 181, at 887.

lored, content-neutral time, place, and manner restrictions are appropriate. Courts, however, should not be closed to any members of the public or their attorneys who seek to vindicate colorable legal rights or claims. This again highlights the problem with forum analysis. No other forum analysis cases, even those concerning traditional public forums, involve a branch of our tripartite system that performs constitutionally required functions, and the speech at issue is essential to the fulfillment of these constitutional functions. Further, in no other forum is the speech necessary to preserve constitutionally guaranteed rights, including the due process right to an unbiased judiciary. As with the other analogies, the forum analogy fails to take into account the nature of the court system as an essential branch of our system of government; the constitutional rights of litigants and criminal defendants to access that system and to protections within that system; and the attorney's role in representing his client and asserting and preserving those rights.

Whatever the term "officer of the court" means, it cannot mean something that denies the very function of the court system and the role of attorneys therein, particularly where it results in the loss of rights and protections for litigants. Under each of these analogies, such protections are lost. Even as "officers of the court," as argued above, attorneys must have the ability to access the courts to challenge judicial conduct and to assert their clients' rights to a fair proceeding.

B. *The Alternate Forum*

In addition to the arguments that attorneys are obliged as officers of the court to refrain from impugning judicial integrity, courts routinely justify their sanctions of attorney speech with the idea that there is an appropriate alternate forum for the speech where complaints about judicial conduct can and should be made.²⁹⁸ The Indiana Supreme Court went so far as to say that where a person has evidence of judicial misconduct, the judicial disciplinary authority is the *only* ap-

²⁹⁸ See, e.g., *In re Evans*, 801 F.2d 703, 707 (4th Cir. 1986) (explaining that "whenever there is proper ground for serious complaint against a judge it is the right and duty of a lawyer to submit his grievances to the proper authorities") (quoting *People ex rel. Chicago Bar Ass'n v. Metzen*, 125 N.E. 734, 735 (Ill. 1919)); *Ramirez v. State Bar of Cal.*, 619 P.2d 399, 405 n.13 (Cal. 1980); *In re Lacey*, 283 N.W.2d 250, 252 (S.D. 1979); *Peters v. Pine Meadow Ranch Home Ass'n*, 151 P.3d 962, 964 (Utah 2007) (explaining that attorneys "faced with genuine judicial misconduct" have "appropriate avenues" to complain of grievances, including "a separate proceeding before the Judicial Conduct Commission").

propriate forum in which to raise a complaint.²⁹⁹ Wendel similarly argues in the context of speech derogatory of the judiciary in court filings:

In just about any conceivable case, the government can show a significant interest and *alternative channels of communication that are not foreclosed by the restriction*. For example, many courts, considering allegations of corruption by judges, have responded that lawyers are free to make these accusations in the appropriate time, place, and manner—such as *to a state commission on judicial conduct*. The government's interest is in maintaining orderly recusal or disqualification procedures, and the alternative channels of communication are established by these mechanisms, which permit complaints to be filed by aggrieved attorneys.³⁰⁰

Wendel concludes that “[i]n general, these decisions are unobjectionable.”³⁰¹

A judicial disciplinary authority is a particularly problematic alternate forum for statements that are originally made by an attorney in a court filing as part of a relevant argument. Attorneys who make statements regarding the judiciary (however unwisely) in court filings generally do so in order to obtain some sort of relief from perceived unfairness or incompetence in the underlying case itself. Attorneys making such arguments are not trying to have the judge punished in the abstract, but are primarily interested in obtaining remedies on behalf of a client in the underlying case.³⁰²

What is essential, then, for statements made in court filings, is that parties receive relief from actions made by biased, abusive, or incompetent judges—and that relief must happen in the underlying case itself

²⁹⁹ *In re Wilkins*, 777 N.E.2d 714, 717 (Ind. 2002) (per curiam) (“Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission.”).

³⁰⁰ Wendel, *supra* note 8, at 394 (emphasis added).

³⁰¹ *Id.* Wendel notes, alternatively, that even such “time, place, manner” restrictions can be enforced in a discriminatory manner, and thus “courts should take seriously the possibility that a rule requiring dignified speech is not a modal [time, place, and manner] regulation at all, but impermissible viewpoint-discrimination.” *Id.* at 395.

³⁰² Further, although it certainly could happen, it is doubtful that attorneys generally include statements about judges in their briefs in order to raise public awareness of perceived judicial abuses. As one dissenting judge pointed out, statements made in a petition for rehearing would have as much effect on public perception of integrity as statements “written on the wind.” See *Office of Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 434 (Ohio 2003) (Pfiefer, J., dissenting).

(usually through an appeal or some other form of review by another tribunal or authority). Criminal defendants, as well as civil litigants, have due process rights to an impartial tribunal.³⁰³ The problem with prohibiting attorneys from making statements in court filings and, instead, requiring attorneys to bring such complaints solely to a judicial disciplinary authority, is that judicial disciplinary authorities are powerless to effect any remedy in the underlying case as to the affected client. Websites for judicial disciplinary authorities warn those filing complaints that the remedy offered by the commission is discipline against the judge, and not any merit-based or case-specific relief.³⁰⁴ The *only* forum whereby a litigant and her counsel can obtain recusal, disqualification, or reassignment of a judge in a case, or bring a claim for denial of due process on the basis of a biased judge, or obtain reversal or remand because of an incompetent or erring judge *is* raising the issue in the underlying case itself. Further, challenges to a lower court's handling of a case must be made on appeal if any relief is to be afforded the affected client. No alternative forum is adequate because no alternative forum can grant the requisite remedy. Indeed, in the criminal context, if the due process claim is not brought in the case initially, it may be determined to be procedurally defaulted and lost to the criminal defendant forever, including on habeas review absent a showing of cause and prejudice.

Thus, the free speech rights of attorneys and clients to raise arguments regarding judicial integrity in court filings cannot be denied on the theory that an alternate forum is available. The alternate forum fails to preserve a litigant's rights in the context in which it matters—that is, when it can affect the outcome of the litigant's case and thus his ultimate legal entitlements. The argument is particularly compelling in the criminal context. It is worthless as a method of securing a criminal defendant's rights to due process to inform the defendant who seeks

³⁰³ See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009).

³⁰⁴ See, e.g., La. Supreme Court, Powers of the Judiciary Commission of Louisiana, http://www.lasc.org/la_judicial_entities/judiciary_commission.asp (last visited Mar. 2, 2010) (limiting powers of the Commission to punishing judges for misconduct); Mass. Comm'n on Judicial Conduct, Frequently Asked Questions, <http://www.mass.gov/cjc/faq.htm#a10> (last visited Mar. 2, 2010) (advising litigants that the Commission does not have the authority to grant them relief); S.C. Judicial Department, Frequently Asked Questions, <http://www.judicial.state.sc.us/discCounsel/FAQ.cfm> (last visited Mar. 2, 2010) (informing litigants that complaints against judges will not affect the outcomes of their cases). This information can be found on the individual websites of the various states' commissions; these websites are listed by the American Judicature Society website. American Judicature Society, <http://www.ajs.org> (last visited Mar. 2, 2010).

relief from a conviction or sentence imposed by an incompetent, biased, or abusive judge that he or she can file a complaint against that judge and the judge may be disciplined for her conduct. The Constitution guarantees the criminal defendant a fair proceeding and an unbiased judge.³⁰⁵ The criminal defendant must be able to assert his or her right in court—which, of course, means that the defense attorney must be able to make that argument freely without fear of sanction for its substance.

Indeed, as noted above, the Due Process Clause of the Constitution requires that where a litigant has a claim or defense—particularly for the civil or criminal *defendant* who is forced to resolve his rights to life, liberty, and property in a court proceeding—the litigant must be heard “at a meaningful time and in a meaningful manner.”³⁰⁶ In its 1971 decision in *Boddie v. Connecticut*, the U.S. Supreme Court explained regarding defendants (both civil and criminal) and their due process rights:

[T]he successful invocation of this [judicial] governmental power by plaintiffs has often created serious problems for defendants’ rights. For at that point, *the judicial proceeding becomes the only effective means of resolving the dispute* at hand and denial of a defendant’s *full access* to that process raises grave problems for its legitimacy.³⁰⁷

Filing a complaint with a state judicial qualification authority does *not* provide a “meaningful” time and manner for litigants to be heard; obtaining redress and relief in the underlying case does. For example, if a defendant is entitled to a new trial on the basis that she was denied due process because of a biased judge, then it does nothing to redress the client’s right for a judicial qualifications commission to reprimand the judge rather than having a court grant the defendant the new trial in the underlying case. A judicial qualifications commission can reprimand, suspend, or discipline a judge. It cannot reverse a conviction, order a new trial in a case, remand a case to a different judge, or reverse the decision of a lower court.³⁰⁸ The client is thus denied his due process rights to a meaningful opportunity to be heard when attorneys are restricted from, or punished for, making relevant arguments regarding the judiciary in court proceedings on the theory that the at-

³⁰⁵ See *Caperton*, 129 S. Ct. at 2259.

³⁰⁶ *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

³⁰⁷ *Id.* at 376 (emphasis added).

³⁰⁸ See *supra* note 304 and accompanying text.

torney can express herself in the alternate forum of a judicial qualifications proceeding. An “alternate forum” cannot save regulations and punishment from condemnation under the Free Speech Clause, where, at the same time, forced use of that alternate forum constitutes a denial of the due process right to court access and to an opportunity to be heard “at a meaningful time and in a meaningful manner.”³⁰⁹

C. The Lack of an Unconstitutional Condition

As I have examined in a separate article,³¹⁰ courts often justify restrictions on attorney speech critical of the judiciary on the idea that attorneys forfeited the right to criticize the judiciary as a condition of their admittance to the bar. For speech that occurs outside of a court setting, the argument obviously raises the issue of whether or not the condition, which deprives the attorney of a pre-existing speech right to criticize public officials, is constitutional. Prior to becoming an attorney, the individual seeking admission had the constitutional right to publicly criticize the judiciary. Upon admission to the bar, however, he gives up that constitutional right in exchange for admission to the practice of law.³¹¹

The problem is somewhat different in the scenario of an attorney’s ability to make statements in court filings and proceedings. Because an attorney, prior to admission to the bar, had no constitutional right to bring claims or speak on behalf of others in a court proceeding, the attorney allegedly gives up nothing when his speech in court filings is restricted as a condition of practicing law. He did not have the right to criticize the judiciary in court filings before he became an attorney, and after becoming an attorney, he still has no right to criticize the judiciary in court filings. Having given up no constitutional rights that he previously had as a lay citizen, there has been no “unconstitutional” condition placed on his law practice. For example, as Wendel contends:

The unconstitutional conditions analysis does not apply to many lawyer free expression cases because the constitutional right that the lawyer claims is infringed is not a right which would exist outside the context in which it was asserted. Suppose a lawyer is disciplined for making racist remarks in a closing argument at trial. It is no avail to claim that the disciplinary

³⁰⁹ See *Boddie*, 401 U.S. at 377.

³¹⁰ See Tarkington, *supra* note 2, at 1622–29.

³¹¹ *Id.*

agency is requiring the lawyer to surrender a constitutional right in exchange for the privilege of trying cases before the courts of the state because the lawyer had no preexisting right to address a jury in a courtroom.³¹²

Thus, Wendel concludes:

When individuals are admitted to the bar, they do not lose expressive rights that they had possessed as private citizens. . . . *In contexts in which they would not have had the right to speak as non-lawyers*, however, *their expressive rights may be restricted* to further goals related to the judicial system³¹³

Although I agree that an attorney's expressive rights may constitutionally be restricted to further certain central goals of the judicial system as discussed in Part III below,³¹⁴ I disagree with Wendel that a restriction does not implicate the attorney's free speech rights merely *because* an attorney did not have a right to speak to a court in a representative capacity prior to being admitted to the bar.

A similar argument was made by the *Garcetti* majority as to public employee speech (and is equally unpersuasive).³¹⁵ The Court stated: "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."³¹⁶ As a private citizen, the employee would never have made the speech and would not have had the liberty to speak in the capacity of a public employee. Therefore, none of his pre-existing liberties are infringed by punishing or restricting speech that is made as part of his official duties as a public employee. To put it in the context of the *Garcetti* facts, prior to being hired as a deputy district attorney, Ceballos had no right as a private citizen to investigate exculpatory evidence and write an internal memo in the district attorney's office recommending the dismissal of criminal charges.³¹⁷ Thus, because the memo "owed its existence" to his public employment—he would not have written it if he had never been hired—none of his pre-existing, private citizen speech rights were infringed.³¹⁸ To bring the analogy back to attorney speech: Because

³¹² Wendel, *supra* note 8, at 373–74.

³¹³ *Id.* at 443 (emphasis added).

³¹⁴ See *infra* notes 339–391 and accompanying text.

³¹⁵ See *Garcetti*, 547 U.S. at 421–22.

³¹⁶ *Id.*

³¹⁷ See *id.* at 413–15.

³¹⁸ See *id.* at 421–22.

speech made by attorneys in court filings “owes its existence” to the fact that the attorney was admitted to practice, under *Garcetti*’s rationale, the attorney can be punished for his speech without infringing any liberties that the attorney would have enjoyed as a private citizen and thus the Free Speech Clause is not violated.

Simply because an attorney did not have a constitutional or any other right to represent others before being admitted to the bar, however, does not mean that she lacks that constitutional right after being admitted to the bar. First, as the *Velazquez* Court held, attorneys in fact have free speech rights to make relevant claims and arguments to courts on behalf of their clients—even though the attorney previously had no right to speak in court in a representative capacity.³¹⁹ Further, beyond *Velazquez*, it would be nonsensical if attorneys did not have such free speech rights. To illustrate: Criminal defendants have a constitutional right to counsel even where they cannot afford one.³²⁰ They also have a constitutional right to an unbiased judge.³²¹ It would be anomalous, then, if criminal defense *attorneys* have no free speech rights to express arguments impugning judicial integrity and asserting their clients’ rights to an unbiased judiciary on the theory that the attorneys previously had no right as private citizens to represent criminal defendants. Such a theory denies criminal defendants the ability to assert their rights and denies them their right to the assistance of counsel. If attorneys are denied free speech rights and can freely be punished or deterred from making arguments about judicial conduct on their clients’ behalf, then clients ultimately lose their rights to an unbiased judiciary and a fair disposition of their cases.

Civil litigants also have “a constitutional right to retain hired counsel.”³²² Thus, although they will not be appointed counsel if they cannot afford an attorney, the Supreme Court has held that it “would be a denial of a hearing, and therefore of due process” under the Fifth and Fourteenth Amendments if civil litigants were prohibited from obtaining and employing attorneys to represent their interests.³²³ Certainly, the attorney must have a free speech right to express what the client could express if proceeding *pro se*. The *pro se* litigant is not an officer of the court; as a private citizen, she has the right to bring relevant ar-

³¹⁹ See *Velazquez*, 531 U.S. at 545–46.

³²⁰ See U.S. CONST. amend. VI; *Boddie*, 401 U.S. at 377.

³²¹ See *Caperton*, 129 S. Ct. at 2259.

³²² *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980); see also *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

³²³ *Powell*, 287 U.S. at 69.

guments and claims to the court.³²⁴ Private citizens thus do have the right and ability to speak to a court and file papers therewith when representing themselves.³²⁵ They should not lose the ability to bring or make certain arguments merely because they hire an “officer of the court” to represent them and speak on their behalf. The fact that the representative did not have a right as a private citizen (before she became a representative) to speak on behalf of the client should not limit the client’s ability to express relevant arguments through that representative. If such a limitation did exist, it would frustrate the client’s right to counsel.

Being admitted to the bar endows the entrant with certain rights, including expressive rights to speak on behalf of clients and raise relevant arguments and claims to the courts. The *Velazquez* court recognized these as constitutional rights afforded to both attorneys and their clients under the Free Speech Clause.³²⁶ The cases from state courts punishing attorneys for speech impugning judicial integrity take a completely opposite view of the matter.³²⁷ In the words of the Missouri Supreme Court, “an attorney’s voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary.”³²⁸ As the Supreme Court of Kansas stated in 2007, an attorney loses this right whether or not she is acting as an attorney or officer of the court.³²⁹ Contrary to these cases, not only do attorneys maintain their pre-existing rights to criticize the judiciary outside of the context of court proceedings,³³⁰ attorneys actually gain a new constitutional right of expression upon admittance to a bar—that is, to criticize and officially challenge judicial behavior in court filings on behalf of clients, even though they did not have that right prior to their admission to the bar.

The necessity of such a right is particularly compelling in the criminal context where defendants are threatened with state-imposed loss of life or liberty. In 2007, however, the Utah Supreme Court ad-

³²⁴ See 28 U.S.C. § 1654 (2006) (“In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.”); *Faretta v. California*, 422 U.S. 806, 819–20 (1975) (explaining that the structure of the Sixth Amendment implies a right to self-representation in criminal proceedings).

³²⁵ See 28 U.S.C. § 1654; *Faretta*, 422 U.S. at 819–20.

³²⁶ See *Velazquez*, 531 U.S. at 543–46.

³²⁷ See *In re Westfall*, 808 S.W.2d 829, 834 (Mo. 1991); see also *In re Shearin*, 765 A.2d at 938; *In re Frerichs*, 238 N.W.2d at 767; *Ky. Bar Ass’n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980); *In re Raggio*, 487 P.2d 499, 500 (Nev. 1971); *Gardner*, 793 N.E.2d at 429.

³²⁸ *In re Westfall*, 808 S.W.2d at 834.

³²⁹ See *In re Pyle*, 156 P.3d at 1243.

³³⁰ See Tarkington, *supra* note 2, at 1622–29.

monished criminal defense attorneys to remember “the pitfalls that may accompany the pursuit of” an argument of judicial bias resulting in a denial of due process.³³¹ The court cited a prior civil case where the Utah Supreme Court had stricken the briefs of an attorney and summarily affirmed a lower court’s decision that was factually and legally erroneous because the attorney questioned the motives of the lower court judge.³³² The court went on to explain that any arguments regarding judicial bias must be “supported by copious facts and record evidence” and “made in a reserved, respectful tone, shunning hyperbole and name-calling.”³³³ By citing a case where the court had summarily affirmed an erroneous decision as a sanction for impugning judicial integrity, the court demonstrated its intention to chill attorney speech made in court filings regarding judicial bias—even when made on behalf of criminal defendants.³³⁴

Criminal defense attorneys should not be admonished to be wary of making *any* colorable constitutional claim on behalf of their clients whose liberty or lives are at stake. Nor should there be extra judicially imposed “pitfalls” (namely, sanctions or other punishment) that “accompany” arguments made by attorneys that a criminal defendant was denied due process because of a biased judge. It is shocking that a court would be more concerned with ensuring respectful rhetoric regarding the judiciary than with ensuring that criminal defendants are afforded due process by impartial judges before losing their liberty.³³⁵ Due process rights afforded to all criminal defendants can be vindicated only if attorneys actively seek their enforcement during the actual criminal proceedings and subsequent judicial review. If the attorney fails to raise such arguments, due process rights are generally waived

³³¹ *State v. Santana-Ruiz*, 167 P.3d 1038, 1044 (Utah 2007).

³³² *See id.*; *see also Peters*, 151 P.3d at 963, 967–68.

³³³ *Santana-Ruiz*, 167 P.3d at 1044.

³³⁴ “First Amendment freedoms ‘are delicate and vulnerable,’ and ‘the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.’” *United States v. Grace*, 461 U.S. 171, 188 (1983) (Marshall, J., concurring in part and dissenting in part) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

³³⁵ In the words of Professors Monroe H. Freedman and Janet Starwood, the constitutional protections afforded criminal defendants demonstrate that “the Framers of the Constitution were well aware that it is people who require protection against the potentially oppressive power of governments and not the other way around.” *See* Monroe H. Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607, 607–08 (1977). In chilling attorney speech from including arguments that may impugn judicial integrity even when a criminal defendant’s life or liberty is threatened by government power, the Utah Supreme Court has failed to recognize this “truism” and, indeed, has “manage[d] to get it backwards.” *See id.* at 608.

and lost forever—even on habeas review. For courts to chill (as did the Utah Supreme Court in *State v. Santana-Ruiz*) or to punish attorney speech raising such claims all but denies the existence of the criminal defendant's due process rights. Attorneys must have the right to make such arguments, when colorable, on behalf of their clients without threat or fear of punishment—even though the attorney had no such expressive right prior to becoming an officer of the court.

Although a private citizen does not have a free speech right to make arguments of judicial bias, corruption, error, or abuse in court filings on behalf of another individual, once that private citizen becomes an attorney, she gains that expressive right whenever the arguments are colorable and relevant. Due process guarantees to criminal and civil litigants of an unbiased judge and basic guarantees and expectations of justice are defeated if the attorney has no right to express and vindicate them in court proceedings.

III. ACCOMMODATING BOTH FREE SPEECH AND JUDICIAL FUNCTIONS

As noted in the introduction, under the standard enunciated by the U.S. Supreme Court in 1964 in both *New York Times Co. v. Sullivan* and *Garrison v. Louisiana*, speech regarding public officials (including the judiciary) can only be punished if the speaker subjectively knew that the statement was false or “in fact entertained serious doubts as to the truth of his publication.”³³⁶ The Court has made clear that a “reasonableness” standard does not comply with *Sullivan*.³³⁷ Yet, despite the express language of MRPC 8.2, which adopted the *Sullivan* standard,³³⁸ courts punish speech for impugning judicial integrity under an objective reasonableness standard.³³⁹ This standard requires attorneys to show that “the attorney had an objectively reasonable factual basis for making the statements”³⁴⁰ or that “the reasonable attorney, considered in light of all his professional functions,” would make such statements

³³⁶ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); see *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

³³⁷ See *St. Amant*, 390 U.S. at 731 (explaining that *Garrison* made it “clear that reckless conduct is *not* measured by whether a reasonably prudent man would have published, or would have investigated before publishing”) (emphasis added); *Garrison*, 379 U.S. at 79 (explaining that the *Sullivan* standard is not satisfied by examining the reasonableness of the person in making the statement); see also Tarkington, *supra* note 2, at 1587–88.

³³⁸ See MODEL RULES OF PROF'L CONDUCT R. 8.2 (2009) (“A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . .”).

³³⁹ See, e.g., Fla. Bar Ass'n v. Ray, 797 So. 2d 556, 560 (Fla. 2001) (per curiam).

³⁴⁰ *Ray*, 797 So. 2d at 559; see also *In re Cobb*, 838 N.E.2d 1197, 1214 (Mass. 2005).

under “the same or similar circumstances.”³⁴¹ Further, courts often punish such speech without examining whether the statements made are in fact false.³⁴² Rather, the burden is generally placed on attorneys to substantiate the truth or reasonableness of their statements.³⁴³ In a few cases, attorneys have been denied the opportunity to prove the truth of their statements altogether.³⁴⁴ These requirements are in direct opposition to the holdings of *Sullivan* and *Garrison*.³⁴⁵

Courts apply the objective reasonableness standard in interpreting MRPC 8.2 regardless of the context or forum in which the statements are made. Thus, statements made in court filings, personal letters, comments to the press, and blogs are punished under the same “objective” interpretation of MRPC 8.2, in contradiction to the requirements of *Sullivan* and *Garrison*.³⁴⁶ As I have argued in a previous article, under core First Amendment theory and as essential to our representative American form of government, *Sullivan* and *Garrison* set forth the constitutional standard that must be employed to punish attorneys for speech impugning judicial integrity, regardless of the forum in which that speech is made.³⁴⁷ Thus MRPC 8.2 should be interpreted to mean what it says: an attorney should be punished for impugning judicial integrity *only* if the attorney knows the statement was false or acts with reckless disregard as to the truth of the statement as defined in *Sullivan* and its progeny.³⁴⁸

Courts have noted special concerns with applying a subjective *Sullivan* standard in punishing statements that appear in court filings.³⁴⁹ For example, in 2005, in *In re Cobb*, the Massachusetts Supreme Judicial Court rejected the *Sullivan* standard, and instead adopted an objective standard for MRPC 8.2 in a case where, in court filings, an attorney ac-

³⁴¹ *In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990); see *Idaho State Bar v. Topp*, 925 P.2d 1113, 1116 (Idaho 1996); *In re Simon*, 913 So. 2d 816, 824 (La. 2005) (per curiam); *In re Westfall*, 808 S.W.2d 829, 837 (Mo. 1991); *In re Holtzman*, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam); see also *Ky. Bar Ass’n v. Heleringer*, 602 S.W.2d 165, 168 (Ky. 1980) (per curiam).

³⁴² See, e.g., *Anthony v. Va. State Bar*, 621 S.E.2d 121, 125 (Va. 2005); see also *Tarkington*, *supra* note 2, at 1592.

³⁴³ See *Tarkington*, *supra* note 2, at 1592.

³⁴⁴ See *id.* at 1592 & n.157 (citing cases).

³⁴⁵ See *id.* at 1587–93.

³⁴⁶ See *id.* at 1571–72 (citing cases).

³⁴⁷ See *id.* at 1575–1605, 1637–38.

³⁴⁸ See *id.* at 1587–91. MRPC 8.2 on its face adopts the *Sullivan* standard, and drafts of the rule indicate that the ABA intended to adopt the *Sullivan* standard. See MODEL RULES OF PROF’L CONDUCT R. 8.2 (2009). Courts, however, have interpreted the rule as not requiring the application of *Sullivan*, but allowing punishment based on an objective reasonableness analysis. See *Tarkington*, *supra* note 2, at 1587 & n.123.

³⁴⁹ See, e.g., *In re Cobb*, 838 N.E.2d at 1214.

cused a judge of being involved in a criminal conspiracy.³⁵⁰ The court explained that the objective standard for MRPC 8.2 “is essential to the orderly and judicious *presentation of cases*,” explaining that courts are “not a place for groundless assertions, whatever their nature.”³⁵¹ Certainly, in adjudicating a case, the judiciary cannot be expected to rely on assertions of fact that are only supported by the *Sullivan* standard: That is, a statement would be permissible as long as the attorney did not know that it was false or did not subjectively entertain serious doubts as to its truth or falsity. In a system of justice that attempts to be fair, assertions on which the court is asked to rely in ruling on a case must have some basis in fact. Indeed, Rule 11 of the FRCP and MRPC 3.1 both require the attorney to have a reasonable basis in fact for assertions presented to a court.³⁵² Other rules contain similar requirements that forbid groundless and frivolous assertions.³⁵³ These requirements are supported by the attorney’s duty of candor to the court as set forth in the Rules of Professional Conduct.³⁵⁴

Importantly, the fact that statements in court filings should have a reasonable factual basis does not require the rejection of the *Sullivan* standard for MRPC 8.2 or other punishment based on impugning judicial integrity. Rather, where statements regarding the judiciary made in court proceedings lack sufficient factual basis, attorneys should be sanctioned under one of several rules (such as FRCP 11 or MRPC 3.1) that require a sufficient factual basis for statements in court filings, rather than being sanctioned for impugning judicial integrity.³⁵⁵ When punishing attorneys under rules such as FRCP 11 or MRPC 3.1, it is appropriate to place the burden on the attorney to show what formed her reasonable factual basis for the assertions. If, however, the problem with statements regarding the judiciary made in court proceedings is that the statement impugns judicial integrity or fails to accord proper respect to the judiciary, then the interest being served by the rule is protection of judicial reputation and therefore, the subjective *Sullivan* standard should apply, requiring the disciplining authority to prove the falsity of the statement.³⁵⁶ Of course, if it can be proven that the statements satisfy the *Sullivan* standard as well, then an attorney can be sanctioned for vio-

³⁵⁰ *Id.* at 1213.

³⁵¹ *Id.* at 1214 (emphasis added).

³⁵² See FED. R. CIV. P. 11; MODEL RULES OF PROF’L CONDUCT R. 3.1 (2009).

³⁵³ See, e.g., FED. R. APP. P. 38, 46; FED. R. CIV. P. 12(f).

³⁵⁴ See MODEL RULES OF PROF’L CONDUCT R. 3.3 (2009).

³⁵⁵ See, e.g., FED. R. CIV. P. 11; MODEL RULES OF PROF’L CONDUCT R. 3.1.

³⁵⁶ *Sullivan*, 376 U.S. at 279–80; see also Tarkington, *supra* note 2, at 1592–93.

lating both MRPC 8.2 *and* for failing to have a reasonable basis for assertions made in court filings under FRCP 11 or MRPC 3.1.³⁵⁷

Discipline under the proper rule and for the appropriate reason is not a mere academic nicety. There are several problems with punishing attorneys under MRPC 8.2 or other rules for impugning judicial integrity where the actual problem is that the attorney lacked a reasonable factual or legal basis for the statements.³⁵⁸ Notably, courts have recognized that MRPC 8.2 on its face applies to any and all statements made by attorneys regardless of the capacity in which the attorney made the statement.³⁵⁹ Thus, where courts interpret MRPC 8.2 in the context of statements made in court filings and determine both that an objective standard applies and that the attorney has the burden to demonstrate the truth or reasonableness of the statement, that same standard is then used for other applications of MRPC 8.2 even where the statements are made by an attorney who is not acting in a representative capacity.³⁶⁰ For example, in 2008, in *Iowa Supreme Court Attorney Disciplinary Board v. Weaver*, the Iowa Supreme Court rejected the *Sullivan* standard and instead adopted a standard requiring an attorney to show that he had “an objectively reasonable basis for making the statements.”³⁶¹ Notably, in *Weaver*, the statements at issue were made to the

³⁵⁷ See FED. R. CIV. P. 11; MODEL RULES OF PROF'L CONDUCT R. 3.1 (2009).

³⁵⁸ See Tarkington, *supra* note 2, at 1571–72.

³⁵⁹ See, e.g., *Notopoulos v. Statewide Grievance Comm.*, 890 A.2d 509, 518–19, 521 (Conn. 2006) (holding that “the Rules of Professional Conduct apply to attorneys acting in their individual capacity unless the rule clearly indicates otherwise” and that “[n]either the language of rule 8.2(a) nor the commentary associated with it clearly suggests that the rule should apply only to attorneys’ professional, as opposed to personal or pro se, statements”); *Iowa Supreme Court Att’y Disciplinary Bd. v. Weaver*, 750 N.W.2d 71, 92 (Iowa 2008) (noting, in suspending lawyer for making statements about the judiciary to the press, that the relevant “ethics rules apply to attorneys even when they are not acting in their professional capacity”); *In re Donohoe*, 580 P.2d 1093, 1096 (Wash. 1978) (holding that predecessor to Rule 8.2 “permeate[s] all aspects of an attorney’s life, whether he be engaged in the active practice of law” or other pursuits); see also *In re Pyle*, 156 P.3d 1231, 1243 (Kan. 2007). As the Supreme Court of Kansas explained in *In re Pyle*:

Upon admission to the bar of this state, attorneys assume certain duties as officers of the court. Among the duties imposed upon attorneys is the duty to maintain the respect due to the courts of justice and to judicial officers. A lawyer is bound by the Code of Professional Responsibility in every capacity in which the lawyer acts, whether he is acting as an attorney or not and is subject to discipline even when involved in nonlegal matters . . .

In re Pyle, 156 P.3d at 1243.

³⁶⁰ See *Weaver*, 750 N.W.2d at 81–82.

³⁶¹ See *id.* (quoting *In re Cobb*, 838 N.E.2d at 469).

press regarding a lower court's ruling while the case was on appeal.³⁶² Yet the *Weaver* court adopted the standard set forth by the Massachusetts Supreme Judicial Court in their 2005 decision, *In re Cobb*.³⁶³ As noted, *In re Cobb* involved statements made in court filings, and among the justifications cited by the Massachusetts court in rejecting the *Sullivan* standard was the necessity of orderly "presentation of cases" and the need for a reasonable basis in fact supporting statements made in court filings.³⁶⁴ Of course, those same interests are not at stake for statements made to the press. But courts rejecting the *Sullivan* standard for MRPC 8.2 have not done so solely in the context of statements made in court filings or in the attorney's official capacity.³⁶⁵ In rejecting the *Sullivan* standard when interpreting MRPC 8.2, courts rely interchangeably on earlier cases involving statements made in court filings and those made in other contexts.³⁶⁶ Thus, adoption of the "objective" standard and rejection of *Sullivan* chills speech not only by deterring attorneys from making statements regarding the judiciary in court proceedings, but also by deterring them from making comments about the judiciary in any forum.³⁶⁷

But even where the statements are made in court filings—resulting in attorneys having additional duties under rules such as FRCP 11 and MRPC 3.1 that require a reasonable basis in fact for the statements—punishment under the "objective" MRPC 8.2 standard is not harmless. Courts applying the "objective reasonableness" interpretation of MRPC 8.2 have required a higher factual showing than that generally required by FRCP 11 or MRPC 3.1.³⁶⁸ As I have explained elsewhere, the threshold for compliance with FRCP 11 or MRPC 3.1 is quite low.³⁶⁹ Federal

³⁶² See *id.* at 77.

³⁶³ See *id.* The *Weaver* court also relied on *Office of Disciplinary Counsel v. Gardner*, 793 N.E. 2d 425, 431 (Ohio 2003), and *In re Graham*, 453 N.W.2d at 322, both of which also involved statements made in court filings. See *Weaver*, 750 N.W.2d at 80–81.

³⁶⁴ *In re Cobb*, 838 N.E.2d at 1214 (emphasis added).

³⁶⁵ See, e.g., *Topp*, 425 P.2d at 1115; *Heleiringer*, 602 S.W.2d at 166.

³⁶⁶ See, e.g., U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993) (relying on both *Westfall* and *Graham* in adopting objective standard even though *Westfall* involved statements to the press and *Graham* involved statements in court filings); *Notopoulos*, 890 A.2d at 517 (relying in large part on a prior case, *Burton v. Mottolese*, 835 A.2d 998 (Conn. 2003), which involved statements made by an attorney in affidavit filed with the court); *In re Westfall*, 808 S.W.2d at 837 (relying on *Graham* case in adopting objective standard, even though *Graham* involved statements in court filings and *Westfall* involved statements to the press).

³⁶⁷ See Tarkington, *supra* note 2, at 1571–72.

³⁶⁸ See, e.g., *Sandlin*, 12 F.3d at 867; *Heleiringer*, 602 S.W.2d at 168; *Santana-Ruiz*, 167 P.3d at 1044; *In re Donohoe*, 580 P.2d at 1097.

³⁶⁹ See Tarkington, *supra* note 2, at 1590–91.

appellate courts interpreting FRCP 11 allow a reasonable basis in fact to be shown based on circumstantial evidence, even where such evidence is weak.³⁷⁰ Thus, sanctions will not be imposed “unless a particular allegation is utterly lacking in support”³⁷¹ or is made in “deliberate indifference to obvious facts.”³⁷² Further, “[FRCP] 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement.”³⁷³ In stark contrast, courts imposing or threatening attorney discipline for impugning judicial integrity have required that the attorney have “substantial competent evidence”³⁷⁴ or “copious facts” supporting the assertions.³⁷⁵ Courts likewise have discounted circumstantial evidence,³⁷⁶ requiring direct proof of the specific allegations.³⁷⁷ Courts have penalized overstatement and rhetorical hyperbole.³⁷⁸ Indeed, some courts have even denied attorneys the opportunity to substantiate their statements.³⁷⁹

³⁷⁰ *Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998).

³⁷¹ *O'Brien v. Alexander*, 101 F.3d 1479, 1489 (2d Cir. 1996).

³⁷² *Baker*, 158 F.3d at 524 (quotations omitted).

³⁷³ *Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 467 (1st Cir. 1993).

³⁷⁴ *Heleinger*, 602 S.W.2d at 168 (emphasis added).

³⁷⁵ *Santana-Ruiz*, 167 P.3d at 1044; see also *In re Donohoe*, 580 P.2d at 1097 (imposing discipline for impugning judicial integrity for statements regarding judicial candidate and stating that “criticism must be well founded, on a high plane, factual, and not personal”).

³⁷⁶ See, e.g., *Topp*, 425 P.2d at 1117.

³⁷⁷ See Tarkington, *supra* note 2, at 1591; see also *Sandlin*, 12 F.3d at 867. In 1993, the U.S. Court of Appeals for the Ninth Circuit decided *U.S. District Court for the Eastern District of Washington v. Sandlin*, affirming the suspension of an attorney from the practice of law for accusing a district court judge of substantively editing a transcript. See 12 F.3d at 867–68. Applying the general standards for FRCP 11, discussed above, several factors would have given Sandlin a reasonable basis in fact for his statements. Namely, the court reporter informed Sandlin that the judge edited transcripts; Sandlin remembered (although incorrectly) the judge saying something that was not in the transcript; Sandlin’s “memory of the TRO hearing agreed with that of his wife, his client, and his former law clerk, all of whom were present at the hearing”; Sandlin “took, and passed, two polygraph tests”; Sandlin consulted experts who determined it was inconclusive whether the audio tape had been edited; and the judge in fact had edited the transcript, just not substantively. See *id.* at 863, 864, 867, 870. Nevertheless the court concluded under the objective reasonableness standard of MRCP 8.2 that Sandlin did not have a “reasonable basis in fact” for his allegation of substantive editing by the judge, and Sandlin was suspended from the practice of law. See *id.* at 867.

³⁷⁸ See, e.g., *In re Wilkins*, 777 N.E.2d 714, 719 (Ind. 2002) (Sullivan, J., dissenting) (explaining that “respondent made a statement of ‘rhetorical hyperbole,’ incapable of being proved true or false” and arguing that “[t]he First Amendment provides lawyers who use such hyperbole concerning the qualifications or integrity of the judge protection from sanction”).

³⁷⁹ See, e.g., *In re Atanga*, 636 N.E.2d 1253, 1257 (Ind. 1994) (per curiam) (excluding from evidence as “irrelevant” attorney’s proffered witnesses to testify regarding judge’s racism); *Ky. Bar Ass’n v. Waller*, 929 S.W.2d 181, 182–83 (Ky. 1996) (denying attorney evi-

In addition to applying a strikingly different “reasonable basis in fact” requirement for statements about the judiciary than is applied for other assertions, courts imposing punishment for impugning judicial integrity have imposed exceptionally severe punishments, including suspending attorneys from the practice of law³⁸⁰ or summarily deciding cases in favor of the opposing party.³⁸¹ In contrast, under FRCP 11, the sanction “must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”³⁸²

Suspension from the practice of law may be warranted where the statements violate the subjective *Sullivan* standard—the attorney knew the statements were false or in fact entertained serious doubts about the truth or falsity of the statements.³⁸³ This is the standard that courts should be applying in disciplining attorneys for impugning judicial integrity, including under MRPC 8.2. But, barring extreme circumstances, suspension as a punishment for a failure to have a reasonable basis in fact for an assertion made in a court filing seems out of proportion—particularly under the heightened showing required by courts under their objective interpretation of MRPC 8.2.³⁸⁴ For example, in

dentary hearing and rejecting argument that “truth or some concept akin to truth, such as accuracy or correctness, is a defense to the charge against him”).

³⁸⁰ See *supra* note 17 (listing cases).

³⁸¹ *Stilley v. Supreme Court Comm. on Prof'l Conduct*, 259 S.W.3d 395, 404–05 (Ark. 2007); *Peters v. Pine Meadow Ranch Home Ass'n*, 151 P.3d 962 (Utah 2007).

³⁸² See FED. R. CIV. P. 11.

³⁸³ See *Garrison*, 379 U.S. at 74; *Sullivan*, 376 U.S. at 279–80.

³⁸⁴ See *Davidson*, 205 P.3d at 1017. In 2009, in *Board of Professional Responsibility v. Davidson*, the Supreme Court of Wyoming suspended Sue Davidson from the practice of law for two months, in large part for filing a Motion for Reassignment of Judge in which Davidson asserted that the trial judge had engaged in an ex parte communication with opposing counsel. *Id.* at 1013–14. Davidson explained in the motion the basis for this belief—namely, that opposing counsel had obtained a trial date before motions regarding assignment of the judge had been heard. *Id.* at 1012. The court repeatedly noted that Davidson's assertion had not been made in compliance with FRCP 11 and MRPC 3.1 because Davidson failed to ask opposing counsel about it or make any sort of reasonable inquiry. *Id.* at 1014. Nevertheless, Davidson was punished under MRPC 8.2 rather than MRPC 3.1. See *id.* Notably, the court found a violation of MRPC 8.4 (engaging in conduct prejudicial to the administration of justice) based on the same facts. See *id.* at 1016. The court explained that the motion violated both Rule 11 of the Wyoming Rules of Civil Procedure and Rule 3.1(c) of the Wyoming Rules of Professional Conduct “due to lack of any reasonable inquiry” and “[t]here can perhaps be no more egregious blow to the administration of justice than an unfounded accusation that a judge has violated the Code of Judicial Conduct.” *Id.* at 1017.

Similarly, in 2002, the Indiana Supreme Court, in *In re Wilkins*, suspended attorney Michael Wilkins from the practice of law for including a footnote in his appellate brief that stated: “[T]he Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law

the 1993 case of *United States District Court for the Eastern District of Washington v. Sandlin*, the U.S. Court of Appeals for the Ninth Circuit affirmed the suspension of an attorney from the practice of law in the district court for six months for alleging that the district court judge substantively edited the transcript of a temporary restraining order (“TRO”) hearing.³⁸⁵ The judge had, in fact, ordered his court reporter to edit the transcript, and this fact been reported to Sandlin by the court reporter.³⁸⁶ Because the judge had not edited the transcripts substantively, however, Sandlin was held to not have a basis in fact for his statements under the objective standard of MRPC 8.2.³⁸⁷

If courts use the appropriate rule and discipline attorneys under MRPC 3.1 or sanction them under FRCP 11, then courts should continue to employ the case law interpreting those rules, rather than requiring a heightened showing or imposing a more severe punishment. To the extent that courts employ FRCP 11, MRCP 3.1, or other facially content-neutral and viewpoint-neutral rules more harshly where the allegations regard the judiciary, then courts are protecting judicial reputation and the *Sullivan* standard should apply.

Importantly, courts do not need to resort to severe punishments, like suspension, or adopt an objective standard for MRPC 8.2 in order to protect their justifiable interests in ensuring that assertions regarding the judiciary made in court filings have a reasonable legal and factual basis and are relevant. Courts already have both the rules and tools to deal with courtroom problems, including irrelevancy, lack of factual and legal basis, and courtroom order.³⁸⁸ It is equally important to the proper functioning of the judiciary and fair resolution of cases that assertions made in court proceedings regarding non-judicial actors have

supported its decision).” See *In re Wilkins*, 777 N.E.2d at 715–16, 719. Further, the court struck Wilkins’ petition to the Indiana Supreme Court to transfer the case because Wilkins included this footnote. See *id.* at 716 (citing *Mich. Mut. Ins. Co. v. Sports, Inc.*, 706 N.E.2d 555, 555 (Ind. 1999) (per curiam)). Although the court said it considered the merits of the claims, it denied the petition without any discussion of the merits. See *Sports*, 706 N.E.2d at 556. Wilkins’ suspension was later reduced to a reprimand. See *In re Wilkins*, 782 N.E.2d 985, 987 (Ind. 2003).

³⁸⁵ 12 F.3d at 868. Sandlin’s assertions regarding the judge were made to authorities and not in filings in the pending case. *Id.* at 863–64. But as in cases regarding court filings, Sandlin made the complaints to obtain relief in the underlying case and was severely sanctioned. *Id.* at 867.

³⁸⁶ See *id.* at 863.

³⁸⁷ See *id.* at 867; see also Tarkington, *supra* note 2, at 1591 n.152.

³⁸⁸ See, e.g., FED. R. CIV. P. 11; MODEL RULES OF PROF’L CONDUCT R. 3.1 (2009).

a basis in fact and are relevant.³⁸⁹ Courts do not need extra protection or extra sanctions where statements or allegations regard the judiciary.³⁹⁰ Nor do they need an objective interpretation of MRPC 8.2 or an exception to the *Sullivan* standard carved out for themselves in order to preserve judicial functions. Rather, courts can use the normal content-neutral and viewpoint-neutral rules used in other contexts if the problem with a statement is irrelevancy or legal or factual insufficiency. If and when courts are doing more than they would do if the statements did not regard the judiciary—including requiring a greater showing to avoid punishment—then they are simply protecting judicial reputation and the requirements of *Sullivan* should apply. The only element that the objective approach to MRPC 8.2 adds to the existing requirements placed on attorneys by MRPC 3.1 and FRCP 11 is a viewpoint-based prohibition on speech regarding the qualifications and integrity of public officials, which by definition is core political speech.³⁹¹ The judiciary should not impose—and constitutionally cannot impose—such a prohibition unless the *Sullivan* standard is satisfied.

CONCLUSION

As compelled by *New York Times Co. v. Sullivan* and *Garrison v. Louisiana*, speech can only be punished for impugning judicial integrity if

³⁸⁹ See, e.g., *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986) (imposing sanctions on attorney for seriously misrepresenting the law with assertions that “turned out indeed to be wildly untrue”).

³⁹⁰ From a practical viewpoint, attorneys are unlikely to rashly impugn judicial integrity. In contrast to statements made about non-judicial participants in a case, the role of judges in the adversary system creates incentives for lawyers to curb their criticism of judges before whom they practice. As Professor David Pimentel has noted, “[t]he most obvious disincentive to complaining of judicial misconduct . . . is the loss of goodwill with the bench.” Moreover, Pimentel’s research indicates that an attorney complaining of judicial misconduct can also expect to have such a complaint affect “the attorney’s standing and reputation in the bar.” Indeed, Pimentel concludes, “[t]he potential impact that filing a complaint of judicial misconduct could have on an attorney’s career cannot be overestimated.” David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909, 933–34 (2009).

³⁹¹ See Tarkington, *supra* note 2, at 1575–87; see also *Sullivan*, 376 U.S. at 270 (highlighting a “profound national commitment to the principle that debate on public issues should be uninhibited . . . and that may well include . . . sharp attacks on government and public officials); *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (holding that speech regarding judicial candidates is “a category of speech that is at the core of our First Amendment freedoms”) (quotation omitted); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 392 (1992) (observing that “[t]he First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed” and concluding that the government has no authority to “license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules”).

the speaker knew the statements were false or made the statements with reckless disregard as to their truth.³⁹² The speech at issue is by definition political speech—speech regarding the qualifications and integrity of public officials—and thus is entitled to the fullest protection offered by the Constitution. But rather than protecting such speech, courts have imposed viewpoint-based punishment regardless of the forum in which the speech is made, whether to the press, on blogs, in personal letters, or otherwise. Suppressing attorney speech regarding the judiciary frustrates democracy by denying the right of the attorney speakers to contribute to the robust, uninhibited, and wide-open debate regarding public officials that is central to our ability to self-govern.³⁹³ Such suppression correspondingly denies the right of the public to receive opinions from those who have the education, training, and exposure to best offer informed views regarding the judiciary.³⁹⁴ This manipulation of public debate regarding the judiciary in turn frustrates the ability of the public to employ democratic correctives to check the abuse of judicial power and allows for judicial self-entrenchment.³⁹⁵

But even in the narrow context of speech made in court filings and proceedings, there are important reasons why attorneys should be allowed to impugn judicial integrity in accordance with the *Sullivan* standard. First is the preservation of the constitutional, statutory, and other rights of clients to an impartial and otherwise qualified judiciary. Although clients assuredly have these rights as a matter of due process and other laws, these rights are all but meaningless to the extent that attorneys are inhibited from asserting such rights or punished for so doing. Civil and criminal litigants have constitutional rights to an unbiased judiciary and to be represented by counsel. Punishing attorneys to preserve judicial reputation frustrates the combined promise of these rights—that attorneys be able to raise on their clients' behalf colorable claims that challenge, and thus potentially impugn, judicial integrity.

Recognizing this free speech right of the attorney thus preserves the attorney-client relationship. Attorneys are to zealously and competently represent their clients. At least, such representation should entail presenting their clients' colorable claims. Attorneys should not be required to pull their punches merely because their client's rights involve questioning actions of the judiciary. This is particularly so where the

³⁹² See generally *Garrison v. Louisiana*, 379 U.S. 64 (1964); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³⁹³ See Tarkington, *supra* note 2, at 1576–79.

³⁹⁴ See *id.* at 1600–05.

³⁹⁵ See *id.* at 1597–1610.

harm sought to be avoided is maligning judicial reputation, an interest that constitutionally cannot be protected outside of the requirements of *Sullivan*. As the U.S. Court of Appeals for the Fifth Circuit held in *United States v. Brown*, when it reversed a district court's suspension and fine of an attorney for an alleged violation of MRPC 8.2: "Attorneys should be free to challenge, in appropriate legal proceedings, a court's perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court."³⁹⁶ Unfortunately, there have been a number of cases where comments have been so misconstrued and sanctions imposed.³⁹⁷

Moreover, allowing attorneys to raise such claims preserves the role of the attorney in the American adversarial system, where each side is required to raise the arguments of its own clients. A viewpoint-based prohibition on court speech is particularly problematic in the adversarial system because it ensures that only one side's view of the matter will be heard.³⁹⁸ Although it has been argued that speech regarding the judiciary is punishable in part because the judiciary does not generally respond to such criticism, that concern is largely superficial in the context of court proceedings. Notably, the judiciary, in response to allegations of judicial bias or incompetence raised in court filings, can respond to such allegations and address them in the form of an opinion. Moreover, the opposing side will often have an incentive to articulate the opposing viewpoint and thus to vindicate the judiciary's reputation. Although judges may "not take to the talk shows to defend themselves," it is likely that an opposing party who does not want a new trial granted, for example, will vigorously advocate on behalf of the judge and the fairness of the underlying proceedings.³⁹⁹ The judiciary need not take up the soapbox or punish the attorney who questioned the integrity of the proceedings to vindicate its reputation. Further, the adversary system is intended to help ensure the fairness of the proceedings by allowing both sides to air their view of the facts, law, and proceedings.⁴⁰⁰ By

³⁹⁶ *United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995).

³⁹⁷ See *supra* note 17 (listing cases).

³⁹⁸ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) ("[C]ontent discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace") (quotation omitted).

³⁹⁹ See *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995).

⁴⁰⁰ See, e.g., *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1056 (D.C. Cir. 1984) ("[T]he adversary system is based on the premise that the truth is best ascertained . . . through the zealous and competent presentation by each side of its strongest case."); see also *Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("The Sixth Amendment recog-

silencing only one side and one viewpoint, the premise and purpose of the adversary system is frustrated.

Somewhat ironically, to the extent that the judiciary deters and punishes speech questioning the integrity of an underlying proceeding, it also frustrates its own role in the proper functioning of the judicial system. As pointed out in by the U.S. Supreme Court in *Legal Services Corp. v. Velazquez*, stifling “the analysis of certain legal issues” and “truncating presentation to the courts . . . prohibits speech and expression upon which the courts must depend for the proper exercise of the judicial power.”⁴⁰¹ This is because the judiciary relies on attorneys to bring arguments and claims—including those of constitutional magnitude—to it for resolution. The judiciary does not investigate and determine on its own whether a particular party has been afforded due process. The judiciary can only examine and rectify such problems when attorneys raise the problems for judicial review. Nevertheless, the judiciary serves a special role in preserving and protecting constitutional rights when abridged by the government, and ought to be particularly jealous of ensuring that it fulfills these constitutional imperatives.⁴⁰² Yet, the judiciary cannot ensure that due process is being afforded by judges when it turns a blind eye to possible judicial deficiencies in providing due process, and even enforces that blindness through punishment.

Beyond all this, the judiciary does not need to carve out an exception to *Sullivan* to preserve its legitimate judicial functions. It already has rules that are both content-neutral and viewpoint-neutral, and supported by significant interests in the fair and just resolution of cases that require attorneys to have a reasonable basis in fact for assertions made in court proceedings. Courts can use those rules and standards, and can enforce them to the same extent when assertions concern non-judicial actors. Thus, employing the *Sullivan* standard in applying MRPC 8.2 or other rules protecting judicial reputation does not give attorneys free license to fill their court filings with irrelevant and frivolous claims of judicial corruption and bias. Rather, using the *Sullivan*

nizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.”).

⁴⁰¹ 531 U.S. 533, 545 (2001) (emphasis added).

⁴⁰² Cf. Jeffrey W. Stempel, *Impeach Brent Benjamin Now!?: Giving Adequate Attention to Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV. (forthcoming 2010) (arguing that Chief Justice Brent Benjamin of the West Virginia Supreme Court of Appeals, whose participation in the *Caperton* litigation denied litigants due process, should be disciplined for his conduct and arguing that without such discipline, “*Caperton*’s message to the legal profession remains muted and provides insufficient incentive for judges to take seriously their duties of impartiality and judicial competence”).

standard for MRPC 8.2 ensures that the judiciary punishes speech that fails to have a sufficient factual basis for that failure; punishes speech that is irrelevant for being irrelevant; and punishes speech that disrupts a judicial proceeding for that disruption. This in turn ensures that the judiciary is in compliance with the Free Speech Clause when it punishes speech to protect its own reputation.

In the words of Justice Thurgood Marshall: "It would be ironic indeed if an exception to the Constitution were to be recognized for the very institution that has the chief responsibility for protecting constitutional rights."⁴⁰³ Courts that carve out an exception to *Sullivan* for themselves—even in the context of court proceedings—frustrate the protection of the underlying constitutional and other legal rights of litigants, the relationship between attorney and client, and the judiciary's own role and responsibility in remedying constitutional violations and providing fair proceedings.

⁴⁰³ *United States v. Grace*, 461 U.S. 171, 185 (1983) (Marshall, J., concurring in part and dissenting in part).